United Nations

Report of the Committee against Torture

Twenty-third session (8-19 November 1999)
Twenty-fourth session (1-19 May 2000)

General Assembly
Official Records
Fifty-fifth session
Supplement No. 44 (A/55/44)

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Chapter I

ORGANIZATIONAL AND OTHER MATTERS

A. States parties to the Convention

1. As at 19 May 2000, the closing date of the twenty-fourth session of the Committee against Torture, there were 119 States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, five more than at the time of the adoption of the previous annual report on 14 May 1999. The Convention was adopted by the General Assembly in resolution 39/46 of 10 December 1984 and opened for signature and ratification in New York on 4 February 1985. It entered into force on 26 June 1987 in accordance with the provisions of its article 27. The list of States which have signed, ratified or acceded to the Convention is contained in annex I to the present report. The States parties that have declared that they do not recognize the competence of the Committee provided for by article 20 of the Convention are listed in annex II. The States parties that have made declarations provided for in articles 21 and 22 of the Convention are listed in annex III.

2. The text of the declarations, reservations or objections made by States parties with respect to the Convention, are reproduced in document CAT/C/2/Rev.5. Updated information in that regard may be found at the United Nations Website (www.un.org - human rights - treaties - Sample access - Status of multilateral treaties deposited with the Secretary-General - chap. IV.9).

B. Opening and duration of the sessions

3. The Committee against Torture has held two sessions since the adoption of its previous annual report. The twenty-third and twenty-fourth sessions of the Committee were held at the United Nations Office at Geneva from 8 to 19 November 1999 and from 1 to 19 May 2000.

4. At its twenty-third session, the Committee held 19 meetings (391st to 409th meetings) and at its twenty-fourth session, the Committee held 29 meetings (410th to 438th meetings). An account of the deliberations of the Committee at its twenty-third and twenty-fourth sessions is contained in the relevant summary records (CAT/C/SR.391-438).

C. Membership and attendance

5. In accordance with article 17 of the Convention, the Seventh Meeting of States parties to the Convention was convened by the Secretary-General at the United Nations Office at Geneva, on 24 November 1999. The following five members of the Committee were elected for a term of four years beginning on 1 January 2000:

Mr. Peter Thomas **Burns**

Mr. Guibril **Camara**

Ms. Felice **Gaer**

Mr. Alejandro **Gonzalez Poblete**

Mr. Andreas **Mavrommatis**

6. In accordance with article 17, paragraph 6, of the Convention and rule 13 of the rules of procedure of the Committee, Mr. Bent Sorensen, by a letter dated 22 December 1999, informed the Secretary-

General of his decision to cease his functions as a member of the Committee as of 31 December 1999. By a note dated 2 March 2000, the Government of Denmark informed the Secretary-General of its decision to appoint, subject to the tacit approval of half or more of the States parties, Mr. Ole Vedel Rasmussen to serve on the Committee for the remainder of Mr. Sorensen's term on the Committee, which will expire on 31 December 2001.

7. Since none of the States parties to the Convention responded negatively within the six-week period after having been informed by the Secretary-General of the proposed appointment, the Secretary-General considered that the States parties had approved the appointment of Mr. Ole Vedel Rasmussen as a member of the Committee, in accordance with the above-mentioned provisions. The list of the members of the Committee in 2000, with their terms of office, appears in annex IV to the present report.

8. All the members attended the twenty-third and the twenty-fourth sessions of the Committee, except Mr. Silva Henriques Gaspar who attended for two of the three weeks of the twenty-fourth session.

D. Solemn declaration by the newly elected members of the Committee

9. At the 410th meeting, on 1 May 2000, the five members of the Committee who had been elected at the Seventh Meeting of States parties to the Convention, as well as the newly appointed member, made the solemn declaration upon assuming their duties, in accordance with rule 14 of the rules of procedure.

E. Election of officers

10. At the 410th meeting, on 1 May 2000, the Committee elected the following officers for a term of two years, in accordance with article 18, paragraph 1, of the Convention and rules 15 and 16 of the rules of procedure:

Chairman:	Mr. Peter **Burns**
Vice-Chairmen:	Mr. Guibril **Camara** Mr. Alejandro **Gonzalez Poblete** Mr. **Yu** Mengjia
Rapporteur:	Mr. Sayed Kassem **El Masry**

F. Agendas

11. At its 391st meeting, on 8 November 1999, the Committee adopted the following items listed in the provisional agenda submitted by the Secretary-General in accordance with rule 6 of the rules of procedure (CAT/C/51) as the agenda of its twenty-third session and added a new item, appearing as item 7 below:

1. Adoption of the agenda.
2. Organizational and other matters.
3. Submission of reports by States parties under article 19 of the Convention.
4. Consideration of reports submitted by States parties under article 19 of the Convention.
5. Consideration of information received under article 20 of the Convention.
6. Consideration of communications under article 22 of the Convention.

7. Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights.

12. At its 410th meeting, on 1 May 2000, the Committee adopted the following items listed in the provisional agenda submitted by the Secretary-General in accordance with rule 6 of the rules of procedure (CAT/C/56) as the agenda of its twenty-fourth session:

1. Opening of the session by the representative of the Secretary-General.
2. Solemn declaration by the newly elected members of the Committee, as well as by a member appointed under article 17, paragraph 6, of the Convention.
3. Election of the officers of the Committee.
4. Adoption of the agenda.
5. Organizational and other matters.
6. Submission of reports by States parties under article 19 of the Convention.
7. Consideration of reports submitted by States parties under article 19 of the Convention.
8. Consideration of information received under article 20 of the Convention.
9. Consideration of communications under article 22 of the Convention.
10. Action by the General Assembly at its fifty-fourth session.
11. Annual report of the Committee on its activities.

G. Question of a draft optional protocol to the Convention

13. At the 393rd meeting, on 9 November 1999, Mr. Sorensen, who had been designated by the Committee as its observer in the inter-sessional open-ended working group of the Commission on Human Rights elaborating the protocol, informed the Committee on the progress made by the working group at its eighth session held at the United Nations at Geneva from 4 to 15 October 1999.

14. At the 410th meeting, on 1 May 2000, the Committee decided that it would be represented by Mr. Mavrommatis as its observer in the next session of the inter-sessional open-ended working group and subsequently by Ms. Gaer.

H. Participation of Committee members in other meetings

15. At the 393rd meeting, on 9 November 1999, Mr. Sorensen informed the Committee on the contents of the final version of a manual for the effective documentation of torture which had been elaborated by a group of non-governmental organizations and medical experts. The principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, included in the manual, were annexed by the Special Rapporteur of the Commission on Human Rights on the question of torture, Sir Nigel Rodley, to his report to the General Assembly at its fifty-fourth session (A/54/426). At the 407th meeting, on 18 November 1999, Mr. Sorensen gave the Committee a brief account of medical views on torture prevention.

16. At the 397th meeting, on 11 November 1999, Mr. Mavrommatis reported on his participation in a workshop on human rights indicators and the right to education which had been held at the United Nations Office at Geneva in September 1999.

I. Cooperation between the Committee, the Board of Trustees of the United Nations Voluntary Fund for the Victims of Torture, the Special Rapporteur of the Commission on Human Rights on the question of torture and the United Nations High Commissioner for Human Rights

17. A joint meeting was held on 16 May 2000 (432nd meeting) between the Committee, the Board of Trustees of the United Nations Voluntary Fund for the Victims of Torture and the Special Rapporteur of the Commission on Human Rights on the question of torture. The United Nations High Commissioner for Human Rights was represented by her Deputy. The participants welcomed the decision of the Commission on Human Rights, in its resolution 2000/43 of 20 April 2000, to draw the attention of Governments to the Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, annexed to that resolution.

18. The Committee, the Board of Trustees, the Special Rapporteur and the High Commissioner for Human Rights decided to issue a joint declaration for the third United Nation International Day in Support of Victims of Torture to be celebrated on 26 June 2000. The text of the declaration appears in annex V to the present report.

J. Methods of work of the Committee

19. At its 434th meeting, on 17 May 2000, the Committee took a decision concerning the procedure under article 22 of the Convention. It decided that whenever a State party failed to report within the time limit indicated by the Committee on measures taken to remedy a situation or a practice which the Committee, in its final views, had considered a violation of the Convention, the Secretariat should, in consultation with the rapporteur of the communication, send a reminder to the State concerned. If the State party failed to respond, the matter would be taken up by the Committee at its subsequent session and could be referred to in the Committee's annual report to the General Assembly.

20. At its 437th meeting, on 18 May 2000, the Committee agreed that the establishment of a pre-sessional working group would facilitate its monitoring activities, in particular with regard to individual communications received under article 22 of the Convention. It decided to pursue this matter at its twenty-fifth session in November 2000.

21. The Committee also discussed the possibility of and the modalities for developing additional general comments. Two Committee members (Mr. Yakovlev and Mr. Camara) were designated to prepare background papers on identified topics for the next session, to serve as a basis for further discussions. The selected topics were: (i) The definition of torture appearing in article 1 of the Convention and the need for its incorporation in the domestic legislation of the State parties and (ii) Interim measures requested by the Committee, exercising its competence under article 22 of the Convention, to avoid possible irreparable damage to a person or persons who claim to be victims of an alleged violation of the Convention.

Chapter II

ACTION BY THE GENERAL ASSEMBLY AT ITS FIFTY-FOURTH SESSION

22. The Committee considered this agenda item at its 410th and 422nd meetings, held on 1 and 9 May 2000.

A. Annual report submitted by the Committee against Torture under article 24 of the Convention

23. The Committee took note of General Assembly resolution 54/156 of 17 December 1999.

B. Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights

Twenty-third session

24. At the 397th meeting, on 11 November 1999, the Chairman of the Committee provided information on the outcome of the Eleventh Meeting of Persons Chairing the Human Rights Treaty Bodies, which had been held at the United Nations Office at Geneva from 31 May to 3 June 1999.

Twenty-fourth session

25. At its 410th meeting, on 1 May 2000, the Committee decided to continue the practice established at its twentieth session of designating thematic rapporteurs who, on the basis of reports of States parties and other information available to them, would bring to the attention of the Committee issues relating to women's rights, children's rights and discriminatory practices relevant to or affecting the implementation of the Convention. Ms. Gaer, Mr. Rasmussen and Mr. Yakovlev, respectively, were designated as rapporteurs for each of the issues referred to above.

Chapter III

SUBMISSION OF REPORTS BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Action taken by the Committee to ensure the submission of reports

26. The Committee, at its 391st and 410th meetings, held on 8 November 1999, and 1 May 2000, considered the status of submission of reports under article 19 of the Convention. The Committee had before it the following documents:

(a) Notes by the Secretary-General concerning initial reports of States parties which were due from 1988 to 2000 (CAT/C/5, 7, 9, 12, 16/Rev.1, 21/Rev.1, 24, 28/Rev.1, 32/Rev.2, 37, 42, 47 and 52);

(b) Notes by the Secretary-General concerning second periodic reports which were due from 1992 to 2000 (CAT/C/17, 20/Rev.1, 25, 29, 33, 38, 43, 48 and 53);

(c) Notes by the Secretary-General concerning third periodic reports which were due from 1996 to 2000 (CAT/C/34, 39, 44, 49 and 54);

(d) Note by the Secretary-General concerning fourth periodic reports which are due in 2000 (CAT/C/55).

27. The Committee was informed that, in addition to the 16 reports that were scheduled for consideration by the Committee at its twenty-third and twenty-fourth sessions (see chap. IV, paras. 34-35), the Secretary General had received the initial reports of Bolivia (CAT/C/52/Add.1) and Slovakia

(CAT/C/24/Add.5), the second periodic reports of Australia (CAT/C/25/Add.11), Cameroon (CAT/C/17/Add.22), the Czech Republic (CAT/C/38/Add.1) and Georgia (CAT/C/48/Add.1) as well as the third periodic reports of Belarus (CAT/C/34/Add.12), Canada (CAT/C/34/Add.13), Greece (CAT/C/39/Add.3) and Guatemala (CAT/C/49/Add.2).

28. The Committee was also informed that the revised version of the initial report of Belize, requested for 10 March 1994 by the Committee at its eleventh session, had not yet been received.

29. In addition, the Committee was informed, at its twenty-third and twenty-fourth sessions, about the situation with regard to overdue reports. As at 19 May 2000, the situation was as follows:

State party	*Date on which the report was due*
Initial reports	
Uganda	25 June 1988
Togo	17 December 1988
Guyana	17 June 1989
Brazil	27 October 1990
Guinea	8 November 1990
Somalia	22 February 1991
Estonia	19 November 1992
Yemen	4 December 1992
Bosnia and Herzegovina	5 March 1993
Benin	10 April 1993
Latvia	13 May 1993
Seychelles	3 June 1993
Cape Verde	3 July 1993
Cambodia	13 November 1993
Burundi	19 March 1994
Antigua and Barbuda	17 August 1994
Costa Rica	10 December 1994
Ethiopia	12 April 1995
Albania	9 June 1995
Chad	9 July 1996
Republic of Moldova	27 December 1996
Côte d'Ivoire	16 January 1997
Lithuania	1 March 1997
Democratic Republic of the Congo	16 April 1997
Malawi	10 July 1997
Honduras	3 January 1998
Kenya	22 March 1998
Saudi Arabia	21 October 1998
Bahrain	4 April 1999
Kazakhstan	24 September 1999
Bangladesh	3 November 1999
Niger	3 November 1999
Zambia	5 November 1999
Indonesia	26 November 1999
South Africa	8 January 2000
Burkina Faso	2 February 2000
Mali	27 March 2000
Bolivia	11 May 2000

State party	*Date on which the report was due*
Second periodic reports	
Afghanistan	25 June 1992
Belize	25 June 1992
Cameroon	25 June 1992
Philippines	25 June 1992
Uganda	25 June 1992
Togo	17 December 1992
Guyana	17 June 1993
Turkey	31 August 1993
Brazil	27 October 1994
Guinea	8 November 1994
Somalia	22 February 1995
Romania	16 January 1996
Nepal	12 June 1996
Venezuela	27 August 1996
Yugoslavia	9 October 1996
Estonia	19 November 1996
Yemen	4 December 1996
Jordan	12 December 1996
Monaco	4 January 1997
Bosnia and Herzegovina	5 March 1997
Benin	10 April 1997
Latvia	13 May 1997
Seychelles	3 June 1997
Cape Verde	3 July 1997
Cambodia	13 November 1997
Burundi	19 March 1998
Slovakia	27 May 1998
Slovenia	14 August 1998
Antigua and Barbuda	17 August 1998
Armenia	12 October 1998
Costa Rica	10 December 1998
Sri Lanka	1 February 1999
Ethiopia	12 April 1999
Albania	9 June 1999
United States of America	19 November 1999
The former Yugoslav Republic of Macedonia	11 December 1999
Namibia	27 December 1999
Republic of Korea	7 February 2000
Tajikistan	9 February 2000
Third periodic reports	
Afghanistan	25 June 1996
Belize	25 June 1996
Bulgaria	25 June 1996
Cameroon	25 June 1996

State party	*Date on which the report was due*
Third periodic reports (*cont.*)	
France	25 June 1996
Philippines	25 June 1996
Russian Federation	25 June 1996
Senegal	25 June 1996
Uganda	25 June 1996
Uruguay	25 June 1996
Austria	27 August 1996
Luxembourg	28 October 1996
Togo	17 December 1996
Colombia	6 January 1997
Ecuador	28 April 1997
Guyana	17 June 1997
Turkey	31 August 1997
Tunisia	22 October 1997
Chile	29 October 1997
Australia	6 September 1998
Algeria	11 October 1998
Brazil	27 October 1998
Guinea	8 November 1998
New Zealand	8 January 1999
Somalia	22 February 1999
Malta	12 October 1999
Germany	30 October 1999
Liechtenstein	1 December 1999
Romania	16 January 2000

30. The Committee expressed concern at the number of States parties which did not comply with their reporting obligations. With regard, in particular, to States parties whose reports were more than four years overdue, the Committee deplored that, in spite of several reminders sent by the Secretary-General and letters or other messages of its Chairman to their respective Ministers for Foreign Affairs, those States parties continued not to comply with the obligations they had freely assumed under the Convention. The Committee stressed that it had the duty to monitor the Convention and that the non-compliance of a State party with its reporting obligations constituted an infringement of the provisions of the Convention.

31. In this connection, the Committee decided to continue its practice of making available lists of States parties whose reports are overdue during the press conferences that the Committee usually holds at the end of each session.

32. Furthermore, the Committee endorsed the recommendation made by the eleventh meeting of chairpersons of the human rights treaty bodies (31 May-4 June 1999) that a document outlining the reporting history of States parties to human rights treaties, including the Convention, be produced on an annual basis to remind States parties of their reporting obligations. The document will replace the system of sending reminders by note verbale.

33. The status of submission of reports by States parties under article 19 of the Convention as at 19 May 2000, the closing date of the twenty-fourth session of the Committee, appears in annex VI to the present report.

Chapter IV

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

34. At its twenty-third and twenty-fourth sessions, the Committee considered reports submitted by 15 States parties, under article 19, paragraph 1, of the Convention. The following reports, listed in the order in which they had been received by the Secretary-General, were before the Committee at its twenty-third session:

Malta: second periodic report	CAT/C/29/Add.6
Austria: second periodic report	CAT/C/17/Add.21
Finland: third periodic report	CAT/C/44/Add.6
Peru: third periodic report	CAT/C/39/Add.1
Azerbaijan: initial report	CAT/C/37/Add.3
Kyrgyzstan: initial report	CAT/C/42/Add.1
Uzbekistan: initial report	CAT/C/32/Add.3

35. The following reports, listed in the order in which they had been received by the Secretary-General, were before the Committee at its twenty-fourth session:

Netherlands: third periodic report	CAT/C/44/Add.4
Poland: third periodic report	CAT/C/44/Add.5
Portugal: third periodic report	CAT/C/44/Add.7
China: third periodic report	CAT/C/39/Add.2
Paraguay: third periodic report	CAT/C/49/Add.1
Armenia: second periodic report	CAT/C/43/Add.3
El Salvador: initial report	CAT/C/44/Add.3
Slovenia: initial report	CAT/C/24/Add.5
United States of America: initial report	CAT/C/28/Add.5

36. The Committee agreed, at the request of the Government concerned, to postpone the consideration of the second periodic report of Armenia.

37. In accordance with rule 66 of the rules of procedure of the Committee, representatives of all the reporting States were invited to attend the meetings of the Committee when their reports were examined. All of the States parties whose reports were considered by the Committee sent representatives to participate in the examination of their respective reports.

38. In accordance with the decision taken by the Committee at its fourth session[1], country rapporteurs and alternate rapporteurs were designated by the Chairman, in consultation with the members of the Committee and the Secretariat, for each of the reports submitted by States parties and considered by the Committee at its twenty-third and twenty-fourth sessions. The list of the above-mentioned reports and the names of the country rapporteurs and their alternates for each of them appear in annex VI to the present report.

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[1] *Official Records of the General Assembly, Forty-fifth session, Supplement No. 44* (A/45/44), paras. 14-16.

39. In connection with its consideration of reports, the Committee also had before it the following documents:

(a) General guidelines regarding the form and contents of initial reports to be submitted by States parties under article 19 of the Convention (CAT/C/4/Rev.2);

(b) General guidelines regarding the form and contents of initial reports to be submitted by States parties under article 19 of the Convention (CAT/C/14/Rev.1).

40. In accordance with the decision taken by the Committee at its eleventh session[2], the following sections, arranged on a country-by-country basis according to the sequence followed by the Committee in its consideration of the reports, contain references to the reports submitted by the States parties and to the summary records of the meetings of the Committee at which the reports were considered, as well as the text of conclusions and recommendations adopted by the Committee with respect to the States parties' reports considered at its twenty-third and twenty-fourth sessions.

A. Malta

41. The Committee considered the second periodic report of Malta (CAT/C/29/Add.6) at its 393rd, 396th and 398th meetings on 9, 10, and 11 November 1999 (CAT/C/SR.393, 396 and 398) and adopted the following conclusions and recommendations.

1. Introduction

42. The Committee notes that the report had been submitted with a delay of two years, it was brief and it was not in complete conformity with the June 1998 guidelines for the preparation of periodic reports. However, the report, was supplemented by an extensive and informative oral presentation, updating it, by the representative of the State party, as well as by the complete answers to questions raised by the Committee members.

43. The Committee realizes the difficulties for small countries to comply with their reporting obligations, yet it wishes to emphasize that complete written information is necessary to facilitate its assessment of the implementation of the Convention.

2. Positive aspects

44. The Committee welcomes the following developments:

(a) The improvement of correctional facilities and, in particular, the arrangements for the housing of illegal immigrants in dormitories formerly used by police staff;

(b) The entrusting of the supervision of asylum seekers to the ordinary police instead of the Special Assignment Group;

(c) The ratification of the 1957 European Convention on Extradition;

(d) The inclusion of human rights in the training programme of the police academy;

(e) The completion and the expected presentation to Parliament of the new Asylum Act which provides, *inter alia*, for: (i) the removal of the geographical exception limiting the granting of asylum to

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[2] *Official Records of the General Assembly, Forty-ninth session, Supplement No. 44* (A/49/44), paras. 12-13.

European refugees; (ii) the appointment of a commissioner to decide asylum cases; (iii) the right to appeal the commissioner's decision before an independent appeals board; and (iv) the fact that asylum seekers cannot be deported before a final decision has been taken in their case.

3. Recommendations

45. The Committee recommends that:

(a) The State party ensure that the envisaged new Asylum Act is consistent with the provisions of the Convention;

(b) The State party ensure that victims of torture are not dissuaded from lodging a complaint by any intimidation or threats, including threats of legal measures being taken against them;

(c) The next periodic report of Malta, which was due on 12 October 1999, be submitted by December 2000 and be prepared in accordance with the guidelines established by the Committee.

B. Austria

46. The Committee considered the second periodic report of Austria (CAT/C/17/Add.21) at its 395th, 398th and 400th meetings on 10, 11 and 12 November 1999 (CAT/C/SR.395, 398 and 400), and adopted the following conclusions and recommendations.

1. Introduction

47. The Committee welcomes the dialogue with the representatives of Austria. Nevertheless, it regrets that the report, due in August 1992, was only submitted in October 1998 and that it was not in conformity with the Committee's guidelines for the preparation of periodic reports.

2. Positive aspects

48. The Committee notes with satisfaction the following:

(a) The Security Police Act of 1993;

(b) The Guidelines for the Intervention of Organs of Public Security;

(c) The fact that the Federal Government is required to submit an annual security report to the Austrian Parliament;

(d) The establishment of an inspection system in accordance with the provisions of article 11 of the Convention;

(e) The Code of Criminal Procedure Modification Act 1993 and the Basic Rights Complaint Act 1992.

3. Subjects of concern

49. The Committee is concerned about the following:

(a) In spite of the fact that the Convention has the status of law in the Austrian legal system and is directly enforceable, a definition of torture as provided in article 1 of the Convention is not included

in the penal legislation of the State party and, therefore the offence of torture does not appear as punishable by appropriate penalties as required by article 4, paragraph 2 of the Convention;

(b) Notwithstanding the entry into force of the Security Police Act 1993, allegations of ill-treatment by the police are still reported;

(c) Potential complaints of abuse committed by police authorities may be discouraged by the provisions enabling the police to accuse of defamation a person who lodges a complaint against them;

(d) Insufficient measures of protection of individuals under a deportation order, which are not in conformity with the provisions of articles 3 and 11 of the Convention, particularly as instanced by a reported case of death during the deportation procedure.

4. Recommendations

50. The Committee recommends that:

(a) Austria establish adequate penal provisions to make torture as defined in article 1 of the Convention a punishable offence in accordance with article 4, paragraph 2 of the Convention;

(b) Clear instructions be given to the police by the competent authorities to avoid any incidence of ill-treatment by police agents. Such instructions should emphasize that ill-treatment by law enforcement officials shall not be tolerated and shall be promptly investigated and punished in cases of violation, in accordance with the law;

(c) Provisions concerning the protection of asylum seekers should fully conform with the relevant international standards, in particular, articles 3 and 11 of the Convention, both in law and practice;

(d) The third periodic report of Austria, which was due in August 1996, be prepared in accordance with the Committee's guidelines and be submitted by December 2000.

C. Finland

51. The Committee considered the third periodic report of Finland (CAT/C/44/Add.6) at its 397th, 400th and 402nd meetings on 11, 12 and 15 November 1999 (CAT/C/SR.397, 400 and 402) and adopted the following conclusions and recommendations.

1. Introduction

52. The Committee welcomes the third periodic report of Finland, which was submitted on time and is in full conformity with the Committee's guidelines for the preparation of periodic reports. The Committee also welcomes the fruitful and open dialogue between the experienced representatives of the State party and itself.

2. Positive aspects

53. The Committee notes with satisfaction the following:

(a) The Act on the Enforcement of Sentences;

(b) The amendment of the Mental Health Act and the Act on State Mental Hospitals;

(c) The amendment of the Military Discipline Act;

(d) The reform of the Finnish public prosecution system;

(e) The measures taken to improve prison conditions for Roma and foreigners;

(f) The decrease in the prison population in Finland;

(g) The efforts made in educational programmes for the police and personnel dealing with asylum seekers;

(h) The legal measures taken to accommodate asylum seekers in places other than prison;

(i) The Finnish practice of making all statements of the accused available to the judge who, according to the law, must take into account only the statements made freely, as required by article 15 of the Convention.

3. Subjects of concern

54. The Committee is concerned about the following:

a) The lack of a definition of torture, as provided in article 1 of the Convention, in the penal legislation of the State party and the lack of a specific offence of torture punishable by appropriate penalties, as required by article 4, paragraph 2, of the Convention;

(b) The use of isolation in certain cases of pre-trial detention, initially authorized by a judge, but whose terms of implementation are decided upon administratively.

4. Recommendations

55. The Committee recommends that:

(a) Finland establish adequate penal provisions to make torture as defined in article 1 of the Convention a punishable offence in accordance with article 4, paragraph 2, of the Convention;

(b) The law governing isolation in pre-trial detention places be changed by establishing judicial supervision for the determination of the isolation, its duration and its maximum period;

(c) In order to reinforce the Conventions objectives to ensure the proper investigation of incidents which may amount to a breach of Article 16 of the Convention, the State party should declare illegal and prohibit organizations which promote and incite racial discrimination, as well as the dissemination of ideas based on racial superiority or hatred, as recommended to the State party by the Committee on the Elimination of Racial Discrimination in March 1999.

D. Peru

56. The Committee considered the third periodic report of Peru (CAT/C/39/Add.1) at its 399th, 402nd and 404th meetings on 12, 15 and 16 November 1999 (CAT/C/SR.399, 402 and 404), and adopted the following conclusions and recommendations.

1. Introduction

57. The Committee welcomes the submission of the third periodic report of Peru, which corresponds generally with the Committee's guidelines concerning the form and content of reports, as well as the continuing dialogue with experienced representatives of the State party, including the introductory oral information given by the delegation.

2. Positive aspects

58. The Committee notes as positive the following:

(a) The inclusion of the crime of torture, in broad conformity with the definition contained in article 1 of the Convention, in the Penal Code;

(b) The policy of placing the crime of aggravated treason within the jurisdiction of the civil courts;

(c) The comprehensive programme of education undertaken in all branches of the civil and armed forces to raise awareness of human rights obligations, in particular the prohibition against torture;

(d) The gradual lifting of the state of emergency laws in most of the country and the declared intention to lift them completely in the year 2000;

(e) The establishment of the office of the Ombudsman;

(f) The creation of a national registry of detainees and persons sentenced to a custodial penalty (Law No. 26295) which is publicly accessible;

(g) The creation of the Ad Hoc National Commission on Pardon;

(h) The reduction in recent years of complaints of maltreatment by persons in custody.

3. Subjects of concern

59. The Committee expresses concern about the following:

(a) The continuing numerous allegations of torture;

(b) The lack of "independence" of those members of the judiciary who have no security of tenure;

(c) The period of incommunicado pre-trial detention of 15 days for persons suspected of acts of terrorism;

(d) The use of military courts to try civilians;

(e) The automatic penalty of at least one year of solitary confinement from the date of trial for anyone convicted of a terrorism offence;

(f) The apparent lack of effective investigation and prosecution of those who are accused of having committed acts of torture;

(g) The use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate;

(h) The maintenance in some parts of the country of emergency laws which abrogate ordinary human rights protection;

(i) The special prison regime applicable to convicted terrorists and in particular to convicted terrorist leaders;

(j) The failure of the Attorney General's Office to keep a precise register of persons who claim that they have been tortured.

4. Recommendations

60. The Committee against Torture reiterates the recommendations it made at the end of its consideration of the second periodic report of Peru on 12 May 1998, which are as follows:

> "While noting and welcoming the new measures that have been taken or announced, including some which are in the spirit of the recommendations made during the consideration of Peru's initial report, the Committee reiterates those recommendations and calls upon the State party to expedite reforms designed to establish a State genuinely founded upon the rule of law.
>
> "The State party should consider repealing laws which may undermine the independence of the judiciary, and take account of the fact that, in this area, the competent authority with regard to the selection and careers of judges should be independent of the Government and the administration. To guarantee such independence, measures should be taken to ensure, for example, that the members of that authority are appointed by the judiciary and that the authority itself decides on its rules of procedure.
>
> "The State party should consider, pursuant to articles 6, 11, 12, 13 and 14 of the Convention, taking measures to ensure that victims of torture or other cruel, inhuman or degrading treatment, and their legal successors, receive redress, compensation and rehabilitation in all circumstances."

61. In addition, the Committee recommends that:

(a) The State party should ensure vigorous investigation and, where appropriate, the prosecution of all reported instances of alleged torture and ill-treatment by its authorities, whether civil or military;

(b) The period of pre-trial incommunicado detention should be abolished;

(c) The **automatic** period of solitary confinement for persons convicted of terrorist offences should be abolished;

(d) Amnesty laws should exclude torture from their reach;

(e) The special regime that applies to convicted terrorists should be reviewed with a view to the gradual abolition of the virtual isolation and other restrictions that are inconsistent with the provisions of article 16 and may in certain cases amount to torture as defined in Article 1 of the Convention;

(f) A similar national registry to that pertaining to detainees should be established for persons claiming to be victims of torture.

62. The Committee once again emphasizes that the State party should return jurisdiction from military courts to civil courts in all matters concerning civilians.

63. Finally, the Committee calls upon the State party to consider making the declarations under articles 21 and 22 of the Convention.

E. Azerbaijan

64. The Committee considered the initial report of Azerbaijan (CAT/C/37/Add.3) at its 401st, 404th and 406th meetings on 15, 16 and 17 November 1999 (CAT/SR.401, 404 and 406) and adopted the following conclusions and recommendations.

1. Introduction

65. The Committee welcomes the initial report of Azerbaijan, which, submitted nearly on time, is in full conformity with the Committee's guidelines for the preparation of initial reports. The Committee also welcomes the open dialogue between the highly qualified representatives of the State party and itself.

2. Positive aspects

66. The Committee notes with satisfaction the following:

(a) The ongoing efforts to establish a legal framework based on universal human values to safeguard fundamental human rights, including freedom from torture;

(b) The important efforts made to establish relevant selection criteria and methods for the training and education of law enforcement and medical personnel on the prohibition of torture;

(c) The noticeable decrease in the number of persons arrested in recent years;

(d) The efforts to improve the conditions in prisons;

(e) The information given by the delegation of the State party on the right of access to legal counsel from the moment of arrest, and the empowerment of the Courts to sanction arrests;

(f) The State party's willingness to cooperate closely with international and regional bodies, such as the Office of the United Nations High Commissioner for Human Rights, the Council of Europe and the Organization for Security and Co-operation in Europe, as well as with international and national non-governmental organizations.

3. Factors and difficulties impeding the application of the provisions of the Convention

67. The Committee takes note of the transitional problems currently faced by the State party, as well as of the difficult political situation prevailing in parts of its territory.

4. Subjects of concern

68. The Committee expresses its concern about the following:

(a) The absence of a definition of torture as provided in article 1 of the Convention in the penal legislation currently in force in the State party, with the result that the specific offence of torture is not punishable by appropriate penalties as required by article 4, paragraph 2 of the Convention;

(b) Numerous and continuing reports of allegations of torture and other cruel, inhuman and degrading treatment and punishment committed by law enforcement personnel;

(c) The apparent failure to provide prompt, impartial and full investigation into numerous allegations of torture that were reported to the Committee, as well as the failure to prosecute, where appropriate, the alleged perpetrators;

(d) The absence of guarantees for independence of the legal profession, particularly members of judiciary, who are appointed for a limited renewable term;

(e) The use of amnesty laws that might extend to the crime of torture.

5. Recommendations

69. The Committee recommends that:

(a) The State party fulfil its intention to establish adequate penal provisions to make torture as defined in article 1 of the Convention a punishable offence in accordance with article 4, paragraph 2, of the Convention;

(b) In view of the numerous allegations of torture and ill-treatment by law enforcement personnel, the State party take all necessary effective steps to prevent the crime of torture and other acts of cruel, inhuman or degrading treatment or punishment;

(c) In order to ensure that perpetrators of torture do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach;

(d) The State party consider repealing laws which may undermine the independence of the judiciary, such as the provisions relating to renewable term appointments;

(e) The State party consider making the declarations under articles 21 and 22 of the Convention.

F. Kyrgyzstan

70. The Committee considered the initial report of Kyrgyztan (CAT/C/42/Add.1) at its 403rd, 406th and 408th meetings on 16, 17 and 18 November 1999 (CAT/C/SR.403, 406 and 408), and adopted the following conclusions and recommendations.

1. Introduction

71. The Committee welcomes the initial report of Kyrgyztan, which was submitted in a timely fashion and is generally in conformity with the Committee's guidelines for the preparation of initial reports. The Committee also welcomes the open dialogue between the highly qualified representatives of the State party and itself.

2. Positive aspects

72. The Committee notes with satisfaction the following:

(a) The continuing efforts to establish a legal framework based upon universal human values to safeguard fundamental human rights, including freedom from torture and other cruel, inhuman or degrading treatment or punishment;

(b) The suspension of the death penalty for a period of two years and its application only to a few serious offences, in any event;

(c) The repeal of the "supervisory" role of the procurator in a criminal trial;

(d) The provisions of the new Code of Criminal Procedure permitting a detained person access to the lawyer of his choice from the moment of detention and obliging the investigating officer to notify the detained person's family of his arrest from the moment of arrest;

(e) Appointment of a special procurator to inspect isolation centres and detention centres with a view to ensuring their conformity to proper standards vis-à-vis the inmates;

(f) The prosecution of various persons for conduct that would be regarded as breaches of the Convention;

(g) The creation of the National Commission for Human Rights, which has a broad mandate to examine and advance human rights conditions in Kyrgyztan, including investigating power in individual cases and monitoring of conditions in prisons;

(h) The educational initiatives of the State party to ensure that its criminal justice personnel properly understand their human rights obligations.

3. Factors and difficulties impeding the application of the provisions of the Convention

73. The Committee takes note of the transition problems currently faced by the State party.

4. Subjects of concern

74. The Committee expresses its concern about the following:

(a) The absence of a definition of torture as provided in article 1 of the Convention in the penal legislation currently in force in the State party, with the result that the specific offence of torture is not punishable by appropriate penalties as required by article 4, paragraph 2, of the Convention;

(b) The numerous and continuing reports of allegations of torture in breach of article 1 of the Convention; and other cruel, inhuman or degrading treatment or punishment (sometimes involving children) by law enforcement personnel, contrary to article 16 of the Convention;

(c) Although the State party has responded in some instances, there is an apparent failure generally to provide prompt, impartial and full investigation into allegations of torture and cruel, inhuman or degrading treatment or punishment, as well as a failure generally to prosecute, where appropriate, the alleged perpetrators;

(d) The insufficient guarantees for independence of the judiciary, particularly in respect of renewable-term appointments made by the President;

(e) The use of amnesty laws that might extend to torture in some cases.

5. Recommendations

75. The Committee recommends that:

(a) The State party amend its domestic penal law to include the crime of torture, consistent with the definition in article 1 of the Convention, and supported by an adequate penalty;

(b) In view of the numerous reports of allegations of torture and ill-treatment by law-enforcement personnel, the State party take all necessary effective steps to prevent these events from occurring;

(c) In order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party ensure the investigation and, where appropriate, the prosecution of all those accused of having committed such acts, and ensure that amnesty laws exclude torture from their reach;

(d) The State party continue its reforms in the police, prosecution and judicial institutions to ensure that each is sensitive to their obligations under the Convention; in particular, urgent steps should be taken to ensure the centrality and independence of the judiciary in the penal system, particularly with reference to limited renewable-term appointments, so as to bring them into line with the 1985 Basic Principles on the Independence of the Judiciary and the 1990 Guidelines on the Role of Prosecutors;

(e) The State party take measures to improve prison conditions, taking into account the 1955 Standard Minimum Rules for the Treatment of Prisoners;

(f) Military places of detention and prisons be supervised to ensure that inmates are not maltreated and they, as should everyone, can be represented by counsel at their trials;

(g) The State party consider abolishing the death penalty;

(h) The State party consider making the declarations under articles 21 and 22 of the Convention.

G. Uzbekistan

76. The Committee considered the initial report of Uzbekistan (CAT/C/32/Add.3) at its 405th, 408th and 409th meetings on 17, 18 and 19 November 1999 (CAT/C/SR.405, 408 and 409), and adopted the following conclusions and recommendations.

1. Introduction

77. The Committee notes with satisfaction the excellent quality of the State party's initial report, which is in conformity with the guidelines, together with its frankness and exhaustiveness, while observing that it was submitted three years late. The Committee also notes with satisfaction the oral introduction of the report made by the head of the delegation. It especially welcomes the readiness of the delegation to enter into a dialogue with the Committee.

2. Positive aspects

78. The Committee has identified several positive aspects, in particular:

(a) The fact that under Uzbek law torture is a separate offence that carries severe penalties;

(b) The popularization and training measures in the field of human rights aimed at law-enforcement personnel;

(c) The adoption of a legal provision (article 15 of the Code of Criminal Procedure) and a Supreme Court plenary court decision making evidence obtained by torture inadmissible;

(d) The large number of investigations carried out following allegations of torture or ill treatment inflicted on citizens by law-enforcement personnel, which proves the existence of an effective system for handling complaints;

(e) The many important projects for the reform of the principal codes and the judicial system announced by the delegation.

3. Factors and difficulties impeding the application of the provisions of the Convention

79. The Committee is aware of the difficulties inherent in any process of transition from a totalitarian regime to the rule of law.

4. Subjects of concern

80. Nevertheless, the Committee notes the following subjects of concern:

(a) The incompleteness of the definition of torture, which leaves unpunished certain aspects of torture as defined in article 1 of the Convention, and, in particular, the impossibility of prosecuting, under existing Uzbek law, an individual guilty of torture at the instigation of a law-enforcement officer and, moreover, the failure to make an attempt to commit torture an offence;

(b) The particularly large number of complaints of torture or maltreatment and the small number of subsequent convictions;

(c) The establishment of a regime of criminal liability applicable to law-enforcement officials (policemen, procurators, judges, etc.) who wrongly prosecute or convict, which could tend to undermine the judiciary or weaken the will to prosecute and punish;

(d) The failure actually to apply the Supreme Court's plenary court decision excluding evidence obtained by torture. In this context, the Committee notes that, in practice, criminal prosecutions in Uzbekistan do not seem to respect the principle of the presumption of innocence and have an inquisitorial character incompatible with article 11 of the Convention;

(e) The lack of a formal prohibition of the expulsion, return or extradition of a person to another State where he runs the risk of being subjected to torture, in accordance with article 3 of the Convention.

5. Recommendations

81. The Committee recommends that the State party:

(a) Adopt a definition of torture strictly in conformity with article 1 of the Convention, by applying article 4;

(b) Review the system for handling complaints of torture or ill treatment, so as to minimize the risk of offences going unpunished;

(c) Revise the judiciary regulations to bring them into conformity with the relevant international legal instruments, in particular (i) the Basic Principles on the Independence of the Judiciary, adopted in 1985, and (ii) the Guidelines on the Role of Prosecutors, adopted in 1990;

(d) Ensure, in practice, absolute respect for the principle of the inadmissibility of evidence obtained by torture;

(e) Formally prohibit the expulsion, return or extradition of persons to a State where they would be in danger of being subjected to torture;

(f) Make the declarations under Articles 21 and 22 of the Convention;

(g) Report to the Committee, in the next report, to be submitted in October 2000, on the missing or incomplete replies to the questions concerning, in particular, the number of persons detained and the number of persons executed after being sentenced to death during the past two years.

H. Poland

82. The Committee considered the third periodic report of Poland (CAT/C/44/Add.5) at its 412th, 415th and 419th meetings, held on 2, 3 and 5 May 2000 (CAT/C/SR.412, 415 and 419) and adopted the following conclusions and recommendations.

1. Introduction

83. The Committee notes with satisfaction that the third periodic report is comprehensive, informative and conforms with the general guidelines for the preparation of State party reports, with regard to both form and content.

84. The oral statement of the delegation of Poland and its explanations and clarifications and the discussion that followed complemented the written information provided.

2. Positive aspects

85. The Committee notes with appreciation the impressive and successful efforts made by the State party that have led to major transformation in the political, social, economic, legislative and institutional spheres in Poland.

86. The Committee notes in particular:

(a) The adoption of the new Constitution which entered into force on 17 October 1997 and which contains new elements for the defence of freedoms and the rights of citizens, stipulates the respect of international law binding on Poland and ensures the precedence of international agreements over domestic law in case of conflict;

(b) The introduction in the new Constitution of the norm that stipulates that "no one be subjected to torture or cruel, inhuman or degrading treatment or punishment", which is an important step towards achieving the requirements and recommendations of the Committee, namely that a definition of torture which fully covers all the elements in the definition contained in article 1 of the Convention be incorporated in domestic law;

(c) The abolition of the death penalty;

(d) The fact that no statute of limitation applies with respect to war crimes and crimes against humanity.

3. Principal subjects of concern

87. The Committee is concerned that the amendments to domestic legislation do not contain any provisions for the prosecution and punishment of those guilty of the crime of torture, as required by articles 1 and 4 of the Convention.

88. The Committee is also concerned that the new Penal Code does not introduce any substantial change regarding orders of superiors when they are invoked as justification of torture. According to existing legislation, criminal responsibility of the recipient of an order is based on his awareness of the criminal nature of the command.

89. The new Penal Code does not include the "danger of exposure to torture" as one of the grounds for the refusal of extradition as is required by article 3 of the Convention.

90. The Committee notes that, in spite of the efforts of the State party, some drastic acts of aggressive behaviour by police officers continue to occur, which has resulted in death in some instances.

91. The Committee is also concerned about the persistence in the army of the practice of the so-called "fala", whereby new recruits are subjected to abuse and humiliation.

4. Recommendations

92. Although the Committee notes that the new Polish Constitution recognizes international conventions ratified by Poland to be part of the Polish legal system, it also notes that in the Polish legal system there are no provisions for making charges relating to, nor penalties applicable to, the crime of torture. Therefore, the Committee recommends that the State party introduce such legislative changes as are necessary to identify torture as a specific crime and to enable prosecutions of torture, as defined in the Convention, and the application of appropriate penalties.

93. The Committee further recommends that the Penal Code be amended to ensure that orders of superiors cannot be invoked, in any circumstances, as justification of torture.

94. The State party should introduce an effective and reliable complaint system that will allow the victims of torture and other forms of cruel, inhuman or degrading treatment or punishment to file complaints.

95. Legislative and administrative measures should be introduced to safeguard against excessive use of force by the police, in particular in connection with the supervision of public meetings and to safeguard against the persistence of abusive measures associated with the practice of so-called "fala" in the army.

I. Portugal

96. The Committee considered the third periodic report of Portugal (CAT/C/44/Add.7) at its 414th, 417th and 421st meetings on 3, 4 and 8 May 2000 (CAT/C/SR.414, 417 and 421), and adopted the following conclusions and recommendations.

1. Introduction

97. The Committee notes with satisfaction that the third periodic report of Portugal, which was received on time, conforms to the general guidelines for the preparation of periodic reports. It expresses its satisfaction at the full, detailed and frank nature of the report.

98. The Committee heard with interest the oral statement of the Portuguese delegation, in which details were provided of events that had occurred since the submission of the report. The Committee noted, in particular, the extension of the Convention to the territory of Macau, which had been confirmed by the Peoples' Republic of China.

2. Positive aspects

99. The Committee notes the ongoing initiatives of the State party to ensure that its laws and institutions conform to the requirements of the Convention.

100. The Committee particularly notes the following developments:

(a) The restructuring of the police agencies, which is designed to emphasize the civilian aspects of policing;

(b) The decision to set up an inspectorate of prisons;

(c) The creation of a database to streamline information relating to cases of abuse of public power;

(d) The enactment of regulations governing police use of firearms that reflect the Basic Principles on the Use of Firearms by Law Enforcement Officials;

(e) The enactment of regulations relating to conditions of detention in police lock-ups, setting out the minimum standards to be observed;

(f) The acknowledgement by the European Committee for the Prevention of Torture, as a result of its 1999 inspection, that improvements have taken place with respect to prisons, including the creation of a national drug unit for prisons and the setting up of new prison health units;

(g) The initiation of the practice of monthly prison visits by magistrates to receive prisoners' complaints concerning treatment;

(h) The introduction in 2000 of a new system of police training with a curriculum developed by a board that includes representatives of civil society;

(i) The active measures that have been taken to reduce violence in Portuguese prisons;

(j) The active dissemination of information relating to the Convention, including publication for the judiciary, in an official periodical, of the proceedings relating to the second periodic report.

3. Subjects of concern

101. The Committee is concerned at continuing reports of a number of deaths and ill-treatment arising out of contact by members of the public with the police.

102. It is also concerned at continuing reports of inter-prisoner violence in prisons.

4. Recommendations

103. The State party should continue to undertake in vigorous measures, both disciplinary and educative, to maintain the momentum moving the police culture in Portugal to one that respects human rights.

104. The State party should particularly ensure that criminal investigation and prosecution of public officers are undertaken **as a matter of course** where the evidence reveals that they have the committed of torture, or cruel or inhuman or degrading treatment and punishment.

105. The State party should continue to take such steps as are necessary to curtail inter-prisoner violence.

J. China

106. The Committee considered the third periodic report of China (CAT/C/39/Add.2) at its 414th, 417th and 421st meetings on 4, 5 and 9 May 2000 (CAT/C/SR.414, 417 and 421), and adopted the following conclusions and recommendations.

1. Introduction

107. The third periodic report of China consists of two parts. Part I covers the whole of China, with the exception of the Hong Kong Special Administrative Region, and Part II covers the Hong Kong Special Administrative Region only.

108. The Committee welcomes the third periodic report of China, which conforms with the general guidelines for the preparation of State party reports. The Committee expresses its appreciation for the additional information and replies provided by the State party and the continued and constructive cooperation of China with the Committee.

Part I – China, excluding the Hong Kong Special Administrative Region

2. Positive aspects

109. The Committee appreciates and encourages the continuing efforts of the Government of China to introduce such amendments into its legislation and practices as would bring them into line with international human rights norms and to entrench legality constitutionally.

110. The Committee welcomes the action taken by the Government of China to implement a number of the recommendations made previously by the Committee, in particular with regard to timely access to defence counsel, the presumption of innocence, amendments to the Criminal Law and Procedure pertaining to fair trials and the introduction of more severe punishment for acts of torture.

111. The Committee notes the effective abolition of the procedure of shelter for investigation and protection and the introduction of certain aspects of fair trial in respect of other proceedings of administrative detention, including re-education through labour.

112. The Committee notes the State party's expressed willingness to cooperate internationally to provide rehabilitation for victims of torture.

113. The Committee welcomes the assurances of the State party that the Convention is binding on Chinese law enforcement and judicial organs.

114. The Committee expresses its appreciation of the State party's communication to the Secretary-General of the United Nations, dated 19 October 1999, whereby it extended the application of the Convention to the Macao Special Administrative Region.

3. Factors and difficulties impeding the application of the provisions of the Convention

115. There are no new factors and difficulties impeding the application of the Convention apart from those referred to in the Committee's conclusions following the examination of the second periodic report of China.

4. Subjects of concern

116. The Committee is concerned about the continuing allegations of serious incidents of torture, especially involving Tibetans and other national minorities.

117. The Committee notes with concern the absence of detailed information and statistics regarding torture and other forms of cruel, inhuman or degrading treatment or punishment, disaggregated by gender.

118. The Committee is concerned that reforms are not implemented uniformly and equally in all parts of China.

119. Concern is expressed about the fact that rules and practices of certain procurators limit the prosecution of torture suspects to certain serious cases.

120. The Committee is concerned about the system of administrative sanctions that permits extrajudicial custodial orders in respect of individuals that have not committed, or are not charged with, a violation of the law.

121. The absence of a uniform and effective investigation mechanism to examine allegations of torture is noted with concern.

122. The Committee expresses concern about reports of coercive and violent measures resorted to by some local officials in implementing the population policy of the State party, contrary to the relevant provisions of the Convention.

5. Recommendations

123. The Committee recommends that the State party incorporate in its domestic law a definition of torture that fully complies with the definition contained in the Convention.

124. The State party is invited to consider, in respect of both its mainland and the Hong Kong Special Administrative Region, declaring in favour of articles 21 and 22 of the Convention and withdrawing its reservation under article 20, and to ensure the continued applicability of article 20 in the Hong Kong Special Administrative Region.

125. The Committee recommends that the State party continue the process of reform, monitor the uniform and effective implementation of new laws and practices and take other measures as appropriate to this end.

126. The Committee recommends that the State party consider abolishing the requirement of applying for permission before a suspect can have access for any reason to a lawyer whilst in custody.

127. The Committee recommends that the State party consider abolishing all forms of administrative detention, in accordance with the relevant international standards.

128. The Committee recommends that the State party ensure the prompt, thorough, effective and impartial investigation of all allegations of torture.

129. The Committee encourages the State party to continue and to intensify its efforts to provide training courses on international human rights standards for law enforcement officers.

130. The Committee recommends that in the next periodic report the State party provide answers to questions that it did not find possible to address during the present consideration and include detailed statistics, disaggregated, *inter alia*, by region and gender.

Part II – Hong Kong Special Administrative Region

6. Factors and difficulties impeding the application of the provisions of the Convention

131. The Committee notes that the reintegration of the Hong Kong Special Administrative Region into China created no factors and difficulties impeding the application of the Convention.

7. Positive aspects

132. The Committee expresses its appreciation to the Government of China for the steps taken to ensure the continued application of the Convention in the Hong Kong Special Administrative Region, the authorities of which have prepared parts of the report.

133. The Committee welcomes the release of all Vietnamese refugees and migrants and the closure of the Pillar Point detention centre.

134. The Committee welcomes the adoption of legislation to facilitate the extradition of persons suspected of having committed acts of torture.

135. The Committee notes as positive the strengthening of the independence of the Independent Police Complaints Council.

136. The Committee welcomes the increase of the maximum sentence for certain sexual crimes, such as incest, and the abolition of the requirement of corroboration in respect of sexual offences.

137. The Committee welcomes the introduction of training courses and other educational measures targeting law enforcement personnel, and the fact that interviews of detainees are videotaped.

8. Subjects of concern

138. The Committee is concerned that the reference to "lawful authority, justification or excuse" as a defence for a person charged with torture, as well as the definition of a public official in the Crimes (Torture) Ordinance, chapter 427, are not in full conformity with article 1 of the Convention.

139. The Committee is concerned that there have as yet been no prosecutions under the Crimes (Torture) Ordinance, despite circumstances brought to the attention of the Committee justifying such prosecutions.

140. Concern is expressed that not all instances of torture and other cruel, inhuman or degrading treatment or punishment are covered by the Crimes (Torture) Ordinance.

141. It is noted with concern that practices in the Hong Kong Special Administrative Region relating to refugees may not be in full conformity with article 3 of the Convention.

9. Recommendations

142. The Committee recommends that the necessary steps be taken to ensure that torture, as defined in article 1 of the Convention, is effectively prosecuted and appropriately sanctioned and that efforts be made to prevent other acts of cruel, inhuman or degrading treatment or punishment, in accordance with the provisions of the Convention.

143. The Committee recommends that continued efforts be made to ensure that the Independent Police Complaints Council becomes a statutory body, with increased competence.

144. The Committee recommends the continuation and intensification of preventive measures, including training for law enforcement officials.

145. The Committee recommends that laws and practices relating to refugees be brought into full conformity with article 3 of the Convention.

K. Paraguay

146. The Committee considered the third periodic report of Paraguay (CAT/C/49/Add.1) at its 418th, 421st and 425th meetings, held on 5, 8 and 10 May 2000 (CAT/C/SR.418, 421 and 425) and adopted the following conclusions and recommendations.

1. Introduction

147. The third periodic report of Paraguay, submitted within the time-limit provided for in article 19 of the Convention, was not in conformity with the general guidelines regarding form and contents adopted by the Committee at its twentieth session.

148. During the introduction of the report and in response to the comments and views of the members of the Committee, the representatives of Paraguay provided comprehensive information which partially made up for the report's shortcomings.

2. Positive aspects

149. The Committee notes with satisfaction:

(a) The entry into force of the new Penal Code and the gradual application of the changes introduced by the new Code of Criminal Procedure, whose enforcement should enable the State party better to fulfil its obligations under the Convention;

(b) The innovations introduced by the new Penal Code, including the extension of its application to the punishment of acts committed abroad against rights which are universally protected under an international treaty, a provision which is in keeping with article 5 of the Convention;

(c) The exclusion of the probative value of any statement which is contrary to procedural guarantees provided for in the Constitution and in international law, as required by the new Code of Criminal Procedure, thus giving national courts binding jurisdiction, in accordance with article 15 of the Convention;

(d) The imposition of appropriate sentences for human rights violations committed during the dictatorship overthrown in 1989;

(e) Programmes for the training of judges, prosecutors and police officers under the new criminal law system;

(f) The announcement by the representatives of Paraguay that a ratification bill will soon be submitted recognizing the competence referred to in articles 21 and 22 of the Convention.

3. Principal subjects of concern

150. The Committee is concerned at:

(a) The failure to establish the Office of the Ombudsman eight years after the entry into force of the 1992 Constitution, which provided for it, and more than four years after the promulgation of the Organization Act;

(b) The fact that in the legislation in force, torture is not defined as an offence in accordance with article 1 of the Convention; the offence provided for in the new Penal Code does not include basic elements of the offence described in the Convention;

(c) The information the Committee received from reliable sources that the practice of torture and cruel, inhuman or degrading treatment or punishment continues in police stations and in Armed Forces prisons and premises, where soldiers performing compulsory military service are subjected to frequent physical ill-treatment;

(d) The lack of programmes for redress and the rehabilitation of the physical and mental health of the victims of torture, as required by article 14 of the Convention. The Committee also did not receive information on any case in which a victim of torture obtained the right to redress.

4. Recommendations

151. The Committee recommends:

(a) The prompt appointment of the Ombudsman and the provision of sufficient resources to enable his Office to establish its presence throughout the national territory;

(b) The inclusion in the Penal Code of provisions defining torture as a crime in accordance with article 1 of the Convention;

(c) The legal recognition of the right of victims of torture to redress and fair and adequate compensation at the expense of the State.

L. El Salvador

152. The Committee considered the initial report of El Salvador (CAT/C/37/Add.4) at its 422nd, 425th and 429th meetings, held on 9, 10 and 12 May 2000 (CAT/C/SR.422, 425 and 429) and adopted the following conclusions and recommendations.

1. Introduction

153. El Salvador became a party to the Convention on 17 June 1996, without reservations. It has not made the declarations provided for in articles 21 and 22.

154. The report complies with the general guidelines regarding the form and contents of initial reports approved by the Committee.

155. The consideration of the report gave rise to a frank and constructive dialogue with the representatives of El Salvador, which the Committee appreciates and acknowledges.

2. Positive aspects

156. The Constitution of the Republic gives legal force to all international treaties which have been ratified, while stipulating that the law may not change or derogate from a treaty's provisions while it is in force and that in the event of a conflict between the treaty and the law, the treaty shall take precedence.

157. The promulgation and effective observance of the new Penal Code and Code of Criminal Procedure, whose provisions include important guarantees for the protection of fundamental human rights, should contribute to better fulfilment of the State's obligations under the Convention.

158. Among those provisions, the Committee attaches particular importance to the following:

(a) The imprescriptibility of both penalties and criminal proceedings in the prosecution of crimes against humanity, including torture;

(b) The attribution of jurisdiction to national courts for the judgement of offences affecting internationally protected property or universally recognized human rights, regardless of by whom and where such offences are committed;

(c) The requirement of written orders authorizing detentions, and the establishment of strict time limits within which a detainee must be brought before a court and the court must give a ruling regarding the detainee's release or remand;

(d) The obligation for national courts to judge individuals charged with offences affecting internationally protected property, in the event that their extradition is rejected;

(e) The creation of the Office of the Procurator for the Protection of Human Rights and the significant activity undertaken by this institution, both in its duties of supervising respect and guarantees for human rights and in the development of human rights promotion and education programmes, particularly those intended for law enforcement personnel;

(f) The creation of prison supervision courts responsible for ensuring the proper enforcement of sentences and respect for the rights of all persons deprived of liberty;

(g) The human rights education activities conducted by the Salvadoran Institute of Human Rights, the Judicial Service Training Colleges and the National Public Security Academy;

(h) The fact that there is no provision in penal legislation which allows torture to be justified by invoking the order of a superior or public authority. On the contrary, the National Civil Police Organization Act expressly excludes that possibility and, under the general provisions of the Penal Code, both the physical perpetrator of the offence and the person or persons ordering it incur criminal liability.

3. Factors and difficulties impeding the application of the Convention

159. The profound alteration in the habits of peaceful coexistence and respect for human rights brought about by the prolonged internal armed conflict that ended in 1992 has required not only the creation or transformation of legal and political institutions, but more fundamentally a process of cultural renewal, which is by nature lengthy.

4. Principal subjects of concern

160. The country's penal legislation does not adequately define the offence of torture in terms consistent with article 1 of the Convention. The type of offence referred to in the Penal Code does not cover all the possible objectives of the offence according to the Convention.

161. There are no rules governing torture victims' right to fair and adequate compensation, at the State's expense, and no State policy providing for as full rehabilitation as possible of the victims.

162. The maintenance in the Code of Criminal Procedure of confessions made out of court is in contradiction with the Constitution, which gives legal force only to confessions made before a judicial authority.

163. There are no legal provisions opposing expulsion, return or extradition when there are substantial grounds for believing that the person concerned would be in danger of being subjected to torture.

164. During the period covered by the report, there have been numerous acts of torture and cruel, inhuman or degrading treatment, as well as disproportionate or unnecessary use of force by police and prison personnel, according to reports by the Office of the Procurator for the Protection of Human Rights and other reliable sources.

165. Cases of extrajudicial executions, whose victims show signs of torture, though very infrequent, would appear to reveal a persistence of the criminal practices employed during the armed conflict superseded by the Peace Agreements.

5. Recommendations

166. The offence of torture should be defined in terms complying with article 1 of the Convention.

167. The right of torture victims to fair and adequate compensation at the State's expense should be regulated, with the introduction of programmes for as full as possible physical and mental rehabilitation of the victims.

168. Recognition of out-of-court confessions should be removed from the Code of Criminal Procedure, on the ground that it contravenes the relevant constitutional guarantee.

169. Legal provisions should be introduced opposing expulsion, return or extradition in circumstances referred to in article 3 of the Convention.

170. Human rights education and promotion activities should be continued, with the introduction of human rights training into formal education programmes intended for new generations.

171. The State is urged to adopt measures ensuring that any allegation of suspected torture is promptly and impartially investigated and, if proved, suitably penalized.

172. The declarations referred to in articles 21 and 22 of the Convention should be made.

173. The second report (first periodic report) should be submitted within the coming year, in order to keep to the schedule provided for in article 19 of the Convention.

174. The Committee hopes in due course to receive information and replies to the questions raised during consideration of the report, as offered by the representatives of El Salvador.

M. United States of America

175. The Committee considered the initial report of the United States of America (CAT/C/28/Add.5) at its 424th, 427th and 431st meetings, on 10, 11 and 15 May 2000 (CAT/C/SR.424, 427 and 431), and adopted the following conclusions and recommendations.

1. Introduction

176. The Committee welcomes the submission of the comprehensive initial report of the United States of America, which, although almost five years overdue, was prepared in full accordance with the guidelines of the Committee.

177. The Committee also thanks the State party for its sincere cooperation in its dialogue with the Committee and takes note of the information supplied in the extensive oral report.

2. Positive aspects

178. The Committee particularly welcomes the following:

(a) The extensive legal protection against torture and other cruel, inhuman or degrading treatment or punishment that exists in the State party and the efforts pursued by the authorities to achieve transparency of its institutions and practices;

(b) The broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the United States of America;

(c) The introduction of executive regulations preventing refoulement of potential torture victims;

(d) The State party's contributions to the United Nations Voluntary Fund for the Victims of Torture;

(e) The creation by executive order of an inter-agency working group to ensure coordination of federal efforts towards compliance with the obligations of the international human rights treaties to which the United States of America is a party;

(f) The assurances given by the delegation that a universal criminal jurisdiction is assumed by the State party whenever an alleged torturer is found within its territory;

(g) The obviously genuine assurances of cooperation to ensure the observance of the Convention extended to the Committee by the delegation of the State party.

3. Subjects of concern

179. The Committee expresses its concern about:

(a) The failure of the State party to enact a federal crime of torture in terms consistent with article 1 of the Convention;

(b) The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention;

(c) The number of cases of police ill-treatment of civilians, and ill-treatment in prisons (including instances of inter-prisoner violence). Much of this ill-treatment by police and prison guards seems to be based upon discrimination;

(d) Alleged cases of sexual assault upon female detainees and prisoners by law enforcement officers and prison personnel. Female detainees and prisoners are also very often held in humiliating and degrading circumstances;

(e) The use of electro-shock devices and restraint chairs as methods of constraint, which may violate the provisions of article 16 of the Convention;

(f) The excessively harsh regime of the "supermaximum" prisons;

(g) The use of "chain gangs", particularly in public;

(h) The legal action by prisoners seeking redress, which has been significantly restricted by the requirement of physical injury as a condition for bringing a successful action under the Prison Litigation Reform Act;

(i) The holding of minors (juveniles) with adults in the regular prison population.

4. Recommendations

180. The Committee recommends that the State party:

(a) Although it has taken many measures to ensure compliance with the provisions of the Convention, also enact a federal crime of torture in terms consistent with article 1 of the Convention and withdraw its reservations, interpretations and understandings relating to the Convention;

(b) Take such steps as are necessary to ensure that those who violate the Convention are investigated, prosecuted and punished, especially those who are motivated by discriminatory purposes or sexual gratification;

(c) Abolish electro-shock stun belts and restraint chairs as methods of restraining those in custody; their use almost invariably leads to breaches of article 16 of the Convention;

(d) Consider declaring in favour of article 22 of the Convention;

(e) Ensure that minors (juveniles) are not held in prison with the regular prison population;

(f) Submit the second periodic report by 19 November 2001.

N. Netherlands

181. The Committee considered the third periodic report of the Netherlands (CAT/C/44/Add.4 and 8) at its 426th, 429th and 433rd meetings on 11, 12 and 16 May 2000 (CAT/C/SR.426, 429 and 433), and adopted the following conclusions and recommendations.

1. Introduction

182. The Committee notes with satisfaction the third periodic report of the Netherlands (European part of the Kingdom, Antilles and Aruba), which conforms to the general guidelines for the preparation of periodic reports as to content and form.

183. The Committee thanks the three Governments concerned for their comprehensive reports as well as for the oral reports and clarifications made by the delegations, which displayed a spirit of openness and cooperation.

184. The Committee welcomes the three accompanying core documents which, although not submitted within the prescribed time, facilitated the examination of the reports.

185. The Committee regrets that no Aruba delegation could be present during the examination of the reports. However, the Committee appreciates the written information and answers provided by Aruba to the Committee.

2. Positive aspects

186. The Committee particularly notes with satisfaction the following:

(a) That it has received no information about allegations of torture in the State party;

(b) As of early 1999, a special National War Criminals Investigation Team has been set up and made operational in the Netherlands (European part), to facilitate the investigation and prosecution of war crimes, which can include torture as specified in the Convention;

(c) The State party's contributions to the United Nations Voluntary Fund for the Victims of Torture;

(d) Clarifications by the representative of the State party with regard to the non-prosecution of General Pinochet when he was on the territory of the Netherlands. While regretting the lack of prosecution, on the grounds of non-feasibility, the Committee notes with satisfaction that the State party representative has affirmed that immunity from prosecution does not at present hold under international human rights law;

(e) The Netherlands Antilles and Aruba have both recently made the act of torture punishable in criminal legislation, as a separate criminal offence, and have also established the principle of universal jurisdiction;

(f) The Netherlands Antilles has established a National Investigation Department to investigate allegations of breach of authority by public servants and a public Complaints Committee on police brutality. In addition, several short and medium-term measures have been taken to ameliorate conditions in prisons;

(g) The assurances that, despite privatization of prisons in the Netherlands Antilles, the State's obligations under the Convention continue to apply;

(h) Measures taken in the Netherlands Antilles to ensure that officials visit the prisons once a week.

3. Subjects of concern

187. The Committee expresses its concern about:

(a) Allegations of police actions in the Netherlands (European part), involving illegitimate body searches, inadequate deployment of female officers, and some excessive use of force by the police in connection with crowd control;

(b) Allegations of inter-prisoner violence, including sexual assault in Koraal Specht prison in the Netherlands Antilles;

(c) The daily use of a riot squad as a means of prisoner control in Koraal Specht prison in the Netherlands Antilles;

(d) Some allegations of police brutality in Aruba and the absence of information, including statistics, regarding the prison population.

4. Recommendations

188. The Committee recommends that:

(a) Measures be taken in the Netherlands (European part) to fully incorporate the Convention in domestic law, including adopting the definition of torture contained in article 1 of the Convention;

(b) Despite improvement already made in the Netherlands Antilles, effective measures should continue to be taken to bring to an end the deplorable conditions of detention at Koraal Specht prison;

(c) The practice of controlling prison discipline by the use, on a virtually daily basis, of riot squads, in the Netherlands Antilles should be reviewed and, in particular, efforts should be made to develop alternative means to prevent inter-prisoner violence. Such means should include the proper training of prison personnel;

(d) Relevant statistics should be provided to the Committee, disaggregated by gender and geography.

O. Slovenia

189. The Committee considered the initial report of Slovenia (CAT/C/24/Add.5) at its 428th, 431st and 435th meetings, on 12, 15 and 17 May 2000 (CAT/C/SR.428, 431 and 435), and adopted the following conclusions and recommendations.

1. Introduction

190. The Committee welcomes the initial report of the Republic of Slovenia, which, although overdue since 1994, was prepared in accordance with the general guidelines of the Committee.

191. The Committee welcomes the initiation of a constructive dialogue with the State party and thanks the delegation for the additional oral information provided.

2. Positive aspects

192. The Committee notes that, when ratifying the Convention on 15 April 1993, the State party did not make a reservation under article 20 and made the declarations under articles 21 and 22 of the Convention.

193. The Committee expresses its appreciation of the fact that the preparation of the initial report of the State party was done with the assistance of a specialized non-governmental institution.

194. The Committee notes as positive that the Constitution of the State party provides a broad range of norms protecting human rights and fundamental freedoms, including the prohibition of torture.

195. The Committee notes with satisfaction that it has received no information about alleged perpetration of torture, as defined in article 1 of the Convention, in the State party.

196. The Committee welcomes the establishment of the special institution of the Ombudsman for the protection of human rights and notes with interest its effective and responsible work.

197. The Committee notes with satisfaction that legislative provisions guarantee the exclusion of evidence from the record in cases where it was obtained in violation of human rights and basic freedoms.

198. The Committee welcomes the amendment to the Criminal Procedure Act which provides for the provision of mandatory legal assistance to the suspect throughout the period of detention. The Committee further notes as positive the introduction of a number of alternative measures to detention during the preliminary investigation.

199. The Committee welcomes the adoption of the Code of Police Practice.

200. The Committee notes as positive the adoption of rules for the construction, renovation and maintenance of the police detention quarters.

201. The Committee welcomes the establishment of the Bureau for Management and Supervision of the Police, and the Unit for Complaint Investigations in the General Police Directorate.

3. Factors and difficulties impeding the application of the provisions of the Convention

202. After gaining independence in 1991, the State party underwent a profound social, economic and political transition, successfully building a democratic State, which demanded great efforts and which may explain the late submission of the initial report.

4. Subjects of concern

203. The Committee notes the information provided in the report that in order to allow for the sanctioning of crimes of torture, special transfer into Slovenia's positive criminal law of the definition of torture contained in article 1 of the Convention is needed. The Committee further notes that the new Law on the Enforcement of Criminal Sanctions, introducing a new definition of torture, came into force on 23 March 2000. However, the Committee is concerned that such a definition has not been introduced into a criminal code and that substantive criminal law does not yet contain a specific *corpus delicti* torture and therefore is not an instrument for the direct incrimination and appropriate punishment of persons guilty of torture.

204. The Committee expresses its concern with regard to allegations about instances of police ill-treatment of and excessive use of force against members of the Roma population, which has reportedly resulted in severe injuries in some instances.

205. Concern is also expressed regarding allegations about the excessive use of force by the police in connection with arrests.

206. The Committee notes that the Aliens Act as a general rule precludes the expulsion of an alien to a country where he or she would be in danger of being subjected to torture. However, the Committee expresses its concern that article 51, paragraph 2, of the Act, which allows for the derogation from the general rule in cases where a person constitutes a threat to public security, does not respect the State party's obligations under article 3 of the Convention.

207. The Committee is concerned about the sub-standard conditions in which asylum-seekers are housed in the State party.

5. Recommendations

208. Although the Committee welcomes the incorporation of a definition of torture, in accordance with article 1 of the Convention, in domestic law relating to the enforcement of criminal sanctions, the Committee recommends that the State party incorporate the definition also in substantive criminal law.

209. The Committee recommends that the State party take the necessary steps to prevent the misuse of force by the police against members of the Roma population and other minorities, particularly, in connection with arrests and detention.

210. The Committee recommends that the State party consider amending the legislation which permits the expulsion of an alien to a country where he or she would be in danger of being tortured, i.e. expulsion justified by the individual being a threat to public security, so that it meets the conditions required by article 3 of the Convention.

211. As a matter of priority, the Committee urges the State party to take all necessary measures to ensure that asylum-seekers are housed in conditions that comply with the requirements of article 16 of the Convention.

212. The State party is invited to submit its second periodic report by 14 August 2001.

Chapter V

ACTIVITIES OF THE COMMITTEE UNDER ARTICLE 20 OF THE CONVENTION

A. General information

213. In accordance with article 20, paragraph 1, of the Convention, if the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State party, the Committee shall invite that State party to cooperate in the examination of the information and, to this end, to submit observations with regard to the information concerned.

214. In accordance with rule 69 of the Committee's rules of procedure, the Secretary-General shall bring to the attention of the Committee information which is, or appears to be, submitted for the Committee's consideration under article 20, paragraph 1, of the Convention.

215. No information shall be received by the Committee if it concerns a State party which, in accordance with article 28, paragraph 1, of the Convention, declared at the time of ratification of or accession to the Convention that it did not recognize the competence of the Committee provided for in article 20, unless that State party has subsequently withdrawn its reservation in accordance with article 28, paragraph 2, of the Convention.

216. The Committee's work under article 20 of the Convention thus commenced at its fourth session and continued at its fifth to twenty-second sessions. During those sessions the Committee devoted the following number of closed meetings or parts of closed meetings to its activities under that article:

Sessions	*Number of closed meetings*
Fourth	4
Fifth	4
Sixth	3
Seventh	2
Eighth	3
Ninth	3
Tenth	8
Eleventh	4
Twelfth	4
Thirteenth	3
Fourteenth	6
Fifteenth	4
Sixteenth	4
Seventeenth	4
Eighteenth	4
Nineteenth	4
Twentieth	5
Twenty-first	3
Twenty-second	8
Twenty-third	4
Twenty-fourth	4

217. In accordance with the provisions of article 20 and rules 72 and 73 of the rules of procedure, all documents and proceedings of the Committee relating to its functions under article 20 of the Convention are confidential and all the meetings concerning its proceedings under that article are closed.

218. However, in accordance with article 20, paragraph 5, of the Convention, the Committee may, after consultations with the State party concerned, decide to include a summary account of the results of the proceedings in its annual report to the States parties and to the General Assembly.

B. Inquiry on Peru

219. On 17 November 1999, the Committee decided to include in its annual report the information appearing below.

220. At its fourteenth session, in April 1995, the Committee examined in closed session information on allegations of systematic practice of torture in Peru which had been communicated to it by non-governmental organizations, pursuant to article 20 of the Convention.

221. The Committee considered that the information appeared to be reliable and that it contained well-founded indications that torture was being systematically practised in Peru. The Committee invited the State party to cooperate in the examination of the information and subsequently in the confidential inquiry that it had decided to establish. The Committee is satisfied with the manner in which Peru cooperated throughout the procedure.

222. The Committee designated for the inquiry two of its members. With the agreement of the Government of Peru, the two Committee members visited Peru from 29 August to 13 September 1998.

223. The Committee completed its inquiry in May 1999 and transmitted its report with conclusions and recommendations to the Government of Peru on 26 May 1999.

224. In November 1999, the Committee decided to postpone any decision about the publication of its summary account of the inquiry.

Chapter VI

CONSIDERATION OF COMMUNICATIONS UNDER ARTICLE 22 OF THE CONVENTION

225. Under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, individuals who claim that any of their rights enumerated in the Convention have been violated by a State party and who have exhausted all available domestic remedies may submit communications to the Committee against Torture for consideration. Forty-one out of 119 States that have acceded to or ratified the Convention have declared that they recognize the competence of the Committee to receive and consider communications under article 22 of the Convention. Those States are: Algeria, Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Greece, Hungary, Iceland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Russian Federation, Senegal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, Uruguay, Venezuela and Yugoslavia. No communication may be considered by the Committee if it concerns a State party to the Convention that has not recognized the competence of the Committee to do so.

226. Consideration of communications under article 22 of the Convention takes place in closed meetings (art. 22, para. 6). All documents pertaining to the work of the Committee under article 22, i.e. submissions from the parties and other working documents of the Committee, are confidential.

227. In carrying out its work under article 22, the Committee may be assisted by a working group of not more than five of its members or by a special rapporteur designated from among its members. The working group or the special rapporteur submits recommendations to the Committee regarding the fulfilment of the conditions of admissibility of communications or assists it in any manner which the Committee may decide (rule 106 of the rules of procedure of the Committee). Special rapporteurs may take procedural decisions (under rule 108) during inter-sessional periods, thereby expediting the processing of communications by the Committee.

228. A communication may not be declared admissible unless the State party has received the text of the communication and has been given an opportunity to furnish information or observations concerning the question of admissibility, including information relating to the exhaustion of domestic remedies

(rule 108, para. 3). Within six months after the transmittal to the State party of a decision of the Committee declaring a communication admissible, the State party shall submit written explanations or statements to the Committee clarifying the matter under consideration and the remedy, if any, which has been taken by it (rule 110, para. 2). In cases that require expeditious consideration, the Committee invites the States parties concerned, if they have no objections to the admissibility of the communications, to furnish immediately their observations on the merits of the case.

229. The Committee concludes examination of an admissible communication by formulating its views thereon in the light of all information made available to it by the complainant and the State party. The views of the Committee are communicated to the parties (art. 22, para. 7, of the Convention and rule 111, para. 3, of the rules of procedure of the Committee) and are made available to the general public. Generally the text of the Committee's decisions declaring communications inadmissible under article 22 of the Convention are also made public, without the identity of the author of the communication being disclosed but with the State party concerned being identified.

230. In its work under article 22 of the Convention, the Committee strives to arrive at its decisions by consensus. However, pursuant to rule 111, paragraph 4, of the Committee's rules of procedure, members can add their individual opinions to the Committee's views. During the period under review, an individual opinion was appended to the Committee's views in case No. 99/1999 (*TPS v. Canada*).

231. Pursuant to rule 112 of its rules of procedure, the Committee shall include in its annual report a summary of the communications examined. The Committee may also include in its annual report the text of its views under article 22, paragraph 7, of the Convention and the text of any decision declaring a communication inadmissible.

232. At the time of adoption of the present report the Committee had registered 163 communications with respect to 19 countries. Of them, 45 communications had been discontinued and 34 had been declared inadmissible. The Committee had adopted views with respect to 45 communications and found violations of the Convention in 18 of them. Thirty-nine communications remained outstanding.

233. At its twenty-third session, the Committee decided to discontinue consideration of one communication and declared one communication admissible, to be considered on the merits. In addition, the Committee declared inadmissible communications Nos. 86/1997 (*P.S. v. Canada*), 93/1997 (*K.N. v. France*), 121/1998 (*S.H. v. Norway*) and 127/1999 (*Z.T. v. Norway*), because they did not meet the conditions laid down in article 22, subparagraph 5 (b), of the Convention. The text of these decisions is reproduced in annex VIII to the present report.

234. Also at its twenty-third session, the Committee adopted views in respect of communications Nos. 60/1996 (*Khaled Ben M'Barek v. Tunisia*), 63/1997 (*Josu Arkauz Arana v. France*), 96/1997 (*A.D. v. Netherlands*), 107/1998 (*K.M. v. Switzerland*), and 118/1998 (*K.T. v. Switzerland*). The texts of the Committee's views are reproduced in annex VIII to the present report.

235. In its views on communication No. 60/1996 (*Khaled Ben M'Barek v. Tunisia*), the Committee considered that the documents communicated to it furnished no proof that the State party had breached articles 11 and 14 of the Convention, but estimated that the State party had not complied with its obligations under articles 12 and 13 to proceed with a prompt and impartial investigation. The Committee considered that an investigation carried out more than 10 months after a foreign non-governmental organization had raised the alarm on the case and more than two months after a report of the Tunisian Higher Committee of Human Rights and Fundamental Freedom asked for a new inquiry did not meet the requirement of promptness. It also considered that the investigation lacked impartiality because, *inter alia*, the Public Prosecutor – a position which in the Tunisian system is under the authority of the Minister of Justice – failed to appeal the decision to dismiss the case.

236. In its views on communication No. 63/1997 (*Josu Arkauz Arana v. France*), the Committee confirmed its decision of admissibility and found that the State party had violated article 3 of the Convention by removing the author to Spain while there were substantial grounds for believing that he would be in danger of torture if returned to his country of origin. The Committee also emphasized that the fact that the author's expulsion was administrative in nature, without the intervention of a judicial authority and without the possibility of his contacting a lawyer or his family, appeared not to respect the rights of detained persons.

237. In its views on communication No. 96/1997 (*A.D. v. Netherlands*), the Committee recalled that granting an extended temporary permit for medical treatment to a person under an expulsion order was not sufficient to fulfil the State party's obligations under article 3 of the Convention. Nevertheless, in the case considered, the Committee concluded that there was no substantial ground for believing that the author would run a personal risk of being tortured if returned to Sri Lanka and there was therefore no breach of article 3 of the Convention.

238. In its views on communication No. 107/1998 (*K.M. v. Switzerland*), the Committee concluded that the information before it did not provide substantial grounds for believing that the author ran a personal risk of being tortured if returned to Turkey, his country of origin. It noted, in this regard, that the reasons for which the author left Turkey dated from 1995 and that he had had no contact with the Kurdistan Workers Party (PKK) since then. Furthermore, the Committee noted that the authenticity of a document according to which the author had been charged for his collusion with the PKK could not be proved.

239. In its views on communication No. 118/1998 (*K.T. v. Switzerland*), the Committee found that the author had not furnished sufficient evidence to support his fears of being arrested and tortured if he was sent back to the Democratic Republic of the Congo, his country of origin. The Committee therefore concluded that the decision of the State party to return the author to that country did not breach article 3 of the Convention.

240. At its twenty-fourth session, the Committee decided to discontinue consideration of five communications for reasons including the voluntary return of the author, the withdrawal of the communication or the absence of response from the author. In addition, the Committee declared inadmissible communications No. 140/1999 (*A.G. v. Sweden*) and No. 95/1997 (*L.O. v. Canada*) because they did not meet the conditions laid down in article 22, paragraph 5 (b) of the Convention. The text of these decisions is reproduced in annex VII to the present report.

241. Also at its twenty-fourth session, the Committee adopted views in respect of communications Nos. 99/1997 (*T.P.S. v. Canada*), 116/1998 (*N.M. v. Switzerland*), 126/1999 (*H.A.D. v. Switzerland*), 130 and 131/1999 (*V.X.N. and H.N. v. Sweden*), 137/1999 (*G.T. v. Switzerland*), 143/1999 (*J.S.C. v. Denmark*). The texts of the Committee's views are reproduced in annex VIII to the present report.

242. In its views on communication No. 99/1997 (*T.P.S. v. Canada*), the Committee concluded that the removal of the author to India did not constitute a violation of article 3 of the Convention because the author had resided more than two years in India since his removal without facing any acts that could amount to torture. Nevertheless, the Committee was deeply concerned by the fact that the State party did not accede to its request, as an interim measures under rule 108, paragraph 9, of its rules of procedure not to remove the author to India while his communication was pending before it. It considered that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee. An individual opinion by one member is attached to the views of the Committee (see annex VII).

243. In its views on communication No. 116/1998 (*N.M. v. Switzerland*), the Committee considered that the arguments developed by the author to support the claim that he would be tortured if returned to the Democratic Republic of the Congo were neither consistent nor convincing. The Committee therefore concluded that there was therefore no breach of article 3 of the Convention.

244. In its views on communication No. 126/1999 (*H.A.D. v. Switzerland*), the Committee did not dispute the allegations of ill-treatment to which the author had been subjected in 1985 even though the medical certificate did not corroborate such allegations. Nevertheless, the Committee concluded that too much time had elapsed since those events to allow it to believe that the author would still be at risk of being tortured if returned to Turkey.

245. The Committee decided to consider jointly communications No. 130 and 131/1999 (*V.X.N. and H.N. v. Sweden*) because of their similarity. In its views on both communications, the Committee found that there remained some doubts as to the authors' credibility. Noting that the sole risk of being imprisoned upon return was not sufficient to invoke the protection of article 3 of the Convention, the Committee considered that so much time had elapsed since the authors fled Viet Nam was so important that their acts could no longer be considered an offence by the Vietnamese authorities.

246. In its views on communication No. 137/1999 (*G.T. v. Switzerland*), the Committee considered that the author had not produced any evidence that would remove its doubts with regard to the actual date of his arrival in Switzerland. Moreover, the numerous inconsistencies and lack of evidence in relation to his activities with the Kurdistan Workers Party (PKK) led the Committee to conclude that there were no substantial grounds for believing that the author ran a personal risk of being tortured if returned to Turkey, his country of origin.

247. In its views on communication No. 143/1999 (*S.C. v. Denmark*), the Committee, although it did not dispute that the author might have encountered difficulties with the Ecuadorian authorities due to her political activities, recalled, *inter alia*, that the author had carried out the said activities as a member of a lawful political party in a country that had ratified the Convention, as well as its optional article 22. The Committee concluded that the information presented by the author did not provide substantial grounds for believing that she ran a foreseeable, real and personal risk of being tortured if she was returned to Ecuador.

Chapter VII

ADOPTION OF THE ANNUAL REPORT OF THE COMMITTEE ON ITS ACTIVITIES

248. In accordance with article 24 of the Convention, the Committee submits an annual report on its activities to the States parties and to the General Assembly.

249. Since the Committee holds its second regular session of each calendar year in late November, which coincides with the regular sessions of the General Assembly, the Committee adopts its annual report at the end of its spring session for appropriate transmission to the General Assembly during the same calendar year.

250. Accordingly, at its 438th meeting, held on 19 May 2000, the Committee considered the draft report on its activities at the twenty-third and twenty-fourth sessions (CAT/C/XXIV/CRP.1 and Add.1-4, 5/Rev.1, 6-8). The report, as amended in the course of the discussion, was adopted by the Committee unanimously. An account of the activities of the Committee at its twenty-fifth session (13 to 24 November 2000) will be included in the annual report of the Committee for 2001.

Annex I

States that have signed, ratified or acceded to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as at 19 May 2000

State	*Date of signature*	*Date of receipt of the instrument of ratification or accession*
Afghanistan	4 February 1985	1 April 1987
Albania		11 May 1984[a]
Algeria	26 November 1985	12 September 1989
Antigua and Barbuda		19 July 1993[a]
Argentina	4 February 1985	24 September 1986
Armenia		13 September 1993[a]
Australia	10 December 1985	8 August 1989
Austria	14 March 1985	29 July 1987
Azerbaijan		16 August 1996[a]
Bahrain		6 March 1998[a]
Bangladesh		5 October 1998[a]
Belarus	19 December 1985	13 March 1987
Belgium	4 February 1985	25 June 1999
Belize		17 March 1986[a]
Benin		12 March 1992[a]
Bolivia	4 February 1985	12 April 1999
Bosnia and Herzegovina		6 March 1992[b]
Brazil	23 September 1985	28 September 1989
Bulgaria	10 June 1986	16 December 1986
Burkina Faso		4 January 1999
Burundi		18 February 1993[a]
Cambodia		15 October 1992[a]
Cameroon		19 December 1986[a]
Canada	23 August 1985	24 June 1987
Cape Verde		4 June 1992[a]
Chad		9 June 1995[a]
Chile	23 September 1987	30 September 1988
China	12 December 1986	4 October 1988
Colombia	10 April 1985	8 December 1987
Costa Rica	4 February 1985	11 November 1993
Côte d'Ivoire		18 December 1995[a]
Croatia		8 October 1991[b]
Cuba	27 January 1986	17 May 1995
Cyprus	9 October 1985	18 July 1991
Czech Republic		1 January 1993[b]
Democratic Republic of the Congo		18 March 1996[a]
Denmark	4 February 1985	27 May 1987
Dominican Republic	4 February 1985	
Ecuador	4 February 1985	30 March 1988
Egypt		25 June 1986[a]
El Salvador		17 June 1996[a]

State	*Date of signature*	*Date of receipt of the instrument of ratification or accession*
Estonia		21 October 1991[a]
Ethiopia		14 March 1994[a]
Finland	4 February 1985	30 August 1989
France	4 February 1985	18 February 1986
Gabon	21 January 1986	
Gambia	23 October 1985	
Georgia		26 October 1994[a]
Germany	13 October 1986	1 October 1990
Greece	4 February 1985	6 October 1988
Guatemala		5 January 1990[a]
Guinea	30 May 1986	10 October 1989
Guyana	25 January 1988	19 May 1988
Honduras		5 December 1996[a]
Hungary	28 November 1986	15 April 1987
Iceland	4 February 1985	23 October 1996
India	14 October 1997	
Indonesia	23 October 1985	28 October 1998
Ireland	28 September 1992	
Israel	22 October 1986	3 October 1991
Italy	4 February 1985	12 January 1989
Japan		29 June 1999[a]
Jordan		13 November 1991[a]
Kazakhstan		26 August 1998[a]
Kenya		21 February 1997[a]
Kuwait		8 March 1996[a]
Kyrgyzstan		5 September 1997[a]
Latvia		14 April 1992[a]
Libyan Arab Jamahiriya		16 May 1989[a]
Liechtenstein	27 June 1985	2 November 1990
Lithuania		1 February 1996[a]
Luxembourg	22 February 1985	29 September 1987
Malawi		11 June 1996[a]
Mali		26 February 1999[a]
Malta		13 September 1990[a]
Mauritius		9 December 1992[a]
Mexico	18 March 1985	23 January 1986
Monaco		6 December 1991[a]
Morocco	8 January 1986	21 June 1993
Mozambique		14 September 1999
Namibia		28 November 1994[a]
Nepal		14 May 1991[a]
Netherlands	4 February 1985	21 December 1988
New Zealand	14 January 1986	10 December 1989
Nicaragua	15 April 1985	
Niger		5 October 1998[a]
Nigeria	28 July 1988	
Norway	4 February 1985	9 July 1986
Panama	22 February 1985	24 August 1987
Paraguay	23 October 1989	12 March 1990
Peru	29 May 1985	7 July 1988
Philippines		18 June 1986[a]

State	*Date of signature*	*Date of receipt of the instrument of ratification or accession*
Poland	13 January 1986	26 July 1989
Portugal	4 February 1985	9 February 1989
Qatar		11 January 2000
Republic of Korea		9 January 1995[a]
Republic of Moldova		28 November 1995[a]
Romania		18 December 1990[b]
Russian Federation	10 December 1985	3 March 1987
Saudi Arabia		23 September 1997[a]
Senegal	4 February 1985	21 August 1986
Seychelles		5 May 1992[a]
Sierra Leone	18 March 1985	
Slovakia		29 May 1993[a]
Slovenia		16 July 1993[a]
Somalia		24 January 1990[b]
South Africa	29 January 1993	10 December 1998
Spain	4 February 1985	21 October 1987
Sri Lanka		3 January 1994[a]
Sudan	4 June 1986	
Sweden	4 February 1985	8 January 1986
Switzerland	4 February 1985	2 December 1986
Tajikistan		11 January 1995[a]
The former Yugoslav Republic of Macedonia		12 December 1994[a]
Togo	25 March 1987	18 November 1987
Tunisia	26 August 1987	23 September 1988
Turkey	25 January 1988	2 August 1988
Turkemistan		25 June 1999[a]
Uganda		3 November 1986[a]
Ukraine	27 February 1986	24 February 1987
United Kingdom of Great Britain and Northern Ireland	15 March 1985	8 December 1988
United States of America	18 April 1988	21 October 1994
Uruguay	4 February 1985	24 October 1986
Uzbekistan		28 September 1995[a]
Venezuela	15 February 1985	29 July 1991
Yemen		5 November 1991[a]
Yugoslavia	18 April 1989	10 September 1991
Zambia		7 October 1998[a]

[a] Accession.
[b] Succession.

Annex II

States parties that have declared, at the time of ratification or accession, that they do not recognize the competence of the Committee provided for by article 20 of the Convention, as at 19 may 2000[a]

Afghanistan
Belarus
China
Cuba
Israel
Kuwait
Morocco
Saudi Arabia
Ukraine

[a] Total of nine States parties.

Annex III

States parties that have made the declarations provided for in articles 21 and 22 of the Convention,[a] as at 19 May 2000[b]

State party	*Date of entry into force*
Algeria	12 October 1989
Argentina	26 June 1987
Australia	29 January 1993
Austria	28 August 1987
Belgium	25 July 1999
Bulgaria	12 June 1993
Canada	24 July 1987
Croatia	8 October 1991
Cyprus	8 April 1993
Czech Republic	3 September 1996
Denmark	26 June 1987
Ecuador	29 April 1988
Finland	29 September 1989
France	26 June 1987
Greece	5 November 1988
Hungary	26 June 1987
Iceland	22 November 1996
Italy	11 February 1989
Liechtenstein	2 December 1990
Luxembourg	29 October 1987
Malta	13 October 1990
Monaco	6 January 1992
Netherlands	20 January 1989
New Zealand	9 January 1990
Norway	26 June 1987
Poland	12 June 1993
Portugal	11 March 1989
Russian Federation	1 October 1991
Senegal	16 October 1996
Slovakia	17 April 1995
Slovenia	16 July 1993
South Africa	9 January 1999
Spain	20 November 1987
Sweden	26 June 1987
Switzerland	26 June 1987
Togo	18 December 1987
Tunisia	23 October 1988
Turkey	1 September 1988
Uruguay	26 June 1987
Venezuela	26 April 1994
Yugoslavia	10 October 1991

[a] Japan, the United Kingdom of Great Britain and Northern Ireland and the United States of America made only the declarations provided for in article 21 of the Convention.

[b] *Total of 41 States parties.*

Annex IV

Membership of the Committee against Torture in 2000

Name	*Country of nationality*	*Term expires on 31 December*
Mr. Peter Thomas **Burns**	Canada	2003
Mr. Guibril **Camara**	Senegal	2003
Mr. Sayed Kassem **El Masry**	Egypt	2001
Ms. Felice **Gaer**	United States of America	2003
Mr. Alejandro **Gonzalez Poblete**	Chile	2003
Mr. Andreas **Mavrommatis**	Cyprus	2003
Mr. António **Silva Henriques Gaspar**	Portugal	2001
Mr. Ole Vedel **Rasmussen**	Denmark	2001
Mr. Alexander M. **Yakovlev**	Russian Federation	2001
Mr. **Yu** Mengjia	China	2001

Annex V

Joint Declaration for the United Nations International Day in Support of Victims of Torture 26 June 2000

The Committee against Torture, the Board of Trustees of the Voluntary Fund for Victims of Torture (the Fund), the Special Rapporteur of the Commission on Human Rights on the question of torture and the United Nations High Commissioner for Human Rights,

Recalling the decision of the General Assembly to declare 26 June United Nations International Day in Support of Victims of Torture,

Taking note of resolution 2000/43 of the Commission on Human Rights adopted on 20 April 2000 which called upon all Governments, the United Nations High Commissioner for Human Rights and United Nations bodies and agencies, as well as relevant intergovernmental and non-governmental organizations to commemorate, on 26 June, the United Nations International Day in Support of Victims of Torture, this year with particular emphasis on reparation for torture victims,

Recalling the joint declarations they adopted on 26 June 1998 and 26 June 1999,

Recalling also the continued regular exchange of views between the Board of Trustees of the Fund, the Committee against Torture and the Special Rapporteur of the Commission on Human Rights on the question of torture with regard to their common mandate to assist victims of torture, and taking note of the need, stressed by the General Assembly, for further exchange of views with other relevant United Nations mechanisms and bodies, as well as for the pursuance of cooperation with relevant United Nations programmes, notably the United Nations crime prevention and criminal justice programme, with a view to enhancing further their effectiveness and cooperation on issues relating to torture, *inter alia* by improving their coordination,

Recalling the appeals against torture made by the Secretary-General and the High Commissioner for Human Rights, in which, *inter alia*, all Governments were exhorted to defeat torture and bring to justice torturers everywhere and reminded that ending torture was a beginning of true respect for the most basic of all human rights: the intrinsic dignity and value of each individual,

Reaffirming that torture is one of the vilest acts to be perpetrated by human beings upon each other,

Concerned that requests for assistance to the Fund for victims of torture and members of their families are constantly increasing,

Recalling that torture is prohibited by article 5 of the Universal Declaration of Human Rights, as well as by specific provisions of international human rights treaties adhered for by the majority of States,

Recognizing that torture is a breach of a non-derogable human right which cannot be justified under any circumstances and that its systematic or widespread practice is characterized as a crime against humanity under international law, in particular, article 7 of the Rome Statute of the International Criminal Court,

Conscious of the necessity to place emphasis on prevention of torture, as recommended by the World Conference on Human Rights in 1993,

Acknowledging the valuable work of Governments, associations, groups and individuals in contributing to the effective elimination of all forms of torture,

Paying tribute to all those who work selflessly to relieve the suffering and assist the recovery of torture victims around the world,

Commending the persistent efforts of non-governmental organizations to combat torture and to alleviate the suffering of victims of torture,

1. Renew their appeal, on the occasion of the United Nations Day in Support of Victims of Torture, 26 June 2000, for the provision of support to victims of torture, this year with particular emphasis on reparation, as well as for the prevention and prohibition of torture and to this end;

2. Stress, in particular, the increasing need for legal assistance to obtain reparation, compensation and rehabilitation services for victims of torture and encourage the Fund to continue to support small projects of humanitarian assistance to victims of torture in various countries, taking into consideration that efficiency is linked to the proximity of these humanitarian organizations to the victims;

3. Express their gratitude and appreciation to those Governments, organizations and individuals that have contributed to the Fund, in particular those which were able to respond favourably to the appeal by the Chairman of the Board of Trustees and paid their contributions before the annual session of the Board, as well as those which have increased the amount of their contribution, and encourage them to continue to do so;

4. Urge all Governments, organizations and individuals to contribute annually to the Fund, preferably by 1 March, before the annual session of its Board of Trustees, and if possible with a substantial increase in the contributions in order to take into consideration the ever-increasing request for medical, psychological, social, economic, legal, humanitarian and other forms of assistance to victims of torture and members of their families worldwide;

5. Urge all States to become parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment without reservation, if they have not already done so;

6. Urge States parties to the Convention that have not yet accepted its optional provisions to do so as soon as possible;

7. Call on all States to redouble their efforts to achieve the early adoption of the optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

8. Urge all States to become parties to the Rome Statute of the International Criminal Court, adopted on 17 July 1998, as a matter of priority;

9. Urge all States to ensure that torture is a crime under their domestic law and to pursue perpetrators rigorously, whenever and wherever the act was committed, and bring them to justice;

10. Welcome the decision of the Commission on Human Rights, in its resolution 2000/43 of 20 April 2000, to draw the attention of Governments to the Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, annexed to that resolution;

11. Support the recommendation of the Commission on Human Rights, in its resolution 2000/32, that the Office of the High Commissioner for Human Rights encourage forensic experts to coordinate further and produce additional manuals concerned with examination of living persons, and welcomes the initiative by the Office of the High Commissioner to publish the "Manual on the effective investigation and

documentation of torture and other Cruel, inhuman or degrading treatment or punishment" in its Professional Training Series, towards which the Fund contributed;

12. Urge all States to provide for fair and adequate reparation, including compensation and rehabilitation of the victims of torture in their domestic law;

13. Urge all States to cooperate fully with the Special Rapporteur of the Commission on Human Rights on the question of torture in fulfilling his mandate;

14. Express their gratitude to those States that have extended invitations to the Special Rapporteur to visit their countries and urge those from whom he has solicited an invitation to respond positively to his request;

15. Consider that, by these means, the crime of torture may be effectively prosecuted and condemned throughout the world and that impunity of torturers, regardless of their status, will not be tolerated;

16. Request the Secretariat to transmit this joint declaration to all Governments and to give it the widest possible distribution.

Annex VI

Status of submission of reports by States parties under article 19 of the Convention, as at 19 may 2000

A. Initial reports

State party	*Date of entry into force*	*Initial report due*	*Date of submission*	*Symbol*
Initial reports due in 1988 (27)				
Afghanistan	26 June 1987	25 June 1988	21 January 1992	CAT/C/5/Add.31
Argentina	26 June 1987	25 June 1988	15 December 1988	CAT/C/5/Add.12/Rev.1
Austria	28 August 1987	27 August 1988	10 November 1988	CAT/C/5/Add.10
Belarus	26 June 1987	25 June 1988	11 January 1989	CAT/C/5/Add.14
Belize	26 June 1987	25 June 1988	18 April 1991	CAT/C/5/Add.25
Bulgaria	26 June 1987	25 June 1988	12 September 1991	CAT/C/5/Add.28
Cameroon	26 June 1987	25 June 1988	15 February 1989 and 25 April 1991	CAT/C/5/Add.16 and 26
Canada	24 July 1987	23 July 1988	16 January 1989	CAT/C/5/Add.15
Denmark	26 June 1987	25 June 1988	26 July 1988	CAT/C/5/Add.4
Egypt	26 June 1987	25 June 1988	26 July 1988 and 20 November 1990	CAT/C/5/Add.5 and 23
France	26 June 1987	25 June 1988	30 June 1988	CAT/C/5/Add.2
German Democratic Republic	9 October 1987	8 October 1988	19 December 1988	CAT/C/5/Add.13
Hungary	26 June 1987	25 June 1988	25 October 1988	CAT/C/5/Add.9
Luxembourg	29 October 1987	28 October 1988	15 October 1991	CAT/C/5/Add.29
Mexico	26 June 1987	25 June 1988	10 August 1988 and 13 February 1990	CAT/C/5/Add.7 and 22
Norway	26 June 1987	25 June 1988	21 July 1988	CAT/C/5/Add.3
Panama	23 September 1987	22 September 1988	28 January 1991	CAT/C/5/Add.24
Philippines	26 June 1987	25 June 1988	26 July 1988 and 28 April 1989	CAT/C/5/Add.6 and 18
Russian Federation	26 June 1987	25 June 1988	6 December 1988	CAT/C/5/Add.11
Senegal	26 June 1987	25 June 1988	30 October 1989	CAT/C/5/Add.19 (Replacing Add.8)
Spain	20 November 1987	19 November 1988	19 March 1990	CAT/C/5/Add.21
Sweden	26 June 1987	25 June 1988	23 June 1988	CAT/C/5/Add.1
Switzerland	26 June 1987	25 June 1988	14 April 1989	CAT/C/5/Add.17
Togo	18 December 1987	17 December 1988		
Uganda	26 June 1987	25 June 1988		
Ukraine	26 June 1987	25 June 1988	17 January 1990	CAT/C/5/Add.20
Uruguay	26 June 1987	25 June 1988	6 June 1991 and 5 December 1991	CAT/C/5/Add.27 and 30
Initial reports due in 1989 (10)				
Chile	30 October 1988	29 October 1989	21 September 1989 and 5 November 1990	CAT/C/7/Add.2 and 9
China	3 November 1988	2 November 1989	1 December 1989	CAT/C/7/Add.5 and 14
Colombia	7 January 1988	6 January 1989	24 April 1989 28 August 1990	CAT/C/7/Add.1 and 10
Czech and Slovak Federal Republic	6 August 1988	5 August 1989	21 November 1989 and 14 May 1991	CAT/C/7/Add.4 and 12
Ecuador	29 April 1988	28 April 1989 and 26 September 1991	27 June 1990 and 28 February 1991	CAT/C/7/Add.7, 11 and 13
Greece	5 November 1988	4 November 1989	8 August 1990	CAT/C/7/Add.8
Guyana	18 June 1988	17 June 1989		
Peru	6 August 1988	5 August 1989	9 November 1992 and 22 February 1994	CAT/C/7/Add.15 and 16
Tunisia	23 October 1988	22 October 1989	25 October 1989	CAT/C/7/Add.3
Turkey	1 September 1988	31 August 1989	24 April 1990	CAT/C/7/Add.6

State party	*Date of entry into force*	*Initial report due*	*Date of submission*	*Symbol*
Initial reports due in 1990 (11)				
Algeria	12 October 1989	11 October 1990	13 February 1991	CAT/C/9/Add.5
Australia	7 September 1989	6 September 1990	27 August 1991 and 11 June 1992	CAT/C/9/Add.8 and 11
Brazil	28 October 1989	27 October 1990		
Finland	29 September 1989	28 September 1990	28 September 1990	CAT/C/9/Add.4
Guinea	9 November 1989	8 November 1990		
Italy	11 February 1989	10 February 1990	30 December 1991	CAT/C/9/Add.9
Libyan Arab Jamahiriya	15 June 1989	14 June 1990	14 May 1991 and 27 August 1992	CAT/C/9/Add.7 and 12/Rev.1
Netherlands	20 January 1989	19 January 1990	14 March, and 9 and 11 September 1990	CAT/C/9/Add.1-3
Poland	25 August 1989	24 August 1990	22 March 1993	CAT/C/9/Add.13
Portugal	11 March 1989	10 March 1990	7 May 1993	CAT/C/9/Add.15
United Kingdom of Great Britain and Northern Ireland	7 January 1989	6 January 1990	22 March 1991 30 April 1992	CAT/C/9/Add.6, 10 and 14
Initial reports due in 1991 (7)				
Germany	31 October 1990	30 October 1991	9 March 1992	CAT/C/12/Add.1
Guatemala	4 February 1990	3 February 1991	2 November 1994 31 July 1995	CAT/C/12/Add.5-6
Liechtenstein	2 December 1990	1 December 1991	5 August 1994	CAT/C/12/Add.4
Malta	13 October 1990	12 October 1991	3 January 1996	CAT/C/12/Add.7
New Zealand	9 January 1990	8 January 1991	29 July 1992	CAT/C/12/Add.2
Paraguay	11 April 1990	10 April 1991	13 January 1993	CAT/C/12/Add.3
Somalia	23 February 1990	22 February 1991		
Initial reports due in 1992 (10)				
Croatia	8 October 1991	7 October 1992	4 January 1996	CAT/C/16/Add.6
Cyprus	17 August 1991	16 August 1992	23 June 1993	CAT/C/16/Add.2
Estonia	20 November 1991	19 November 1992		
Israel	2 November 1991	1 November 1992	25 January 1994	CAT/C/16/Add.4
Jordan	13 December 1991	12 December 1992	23 November 1994	CAT/C/16/Add.5
Nepal	13 June 1991	12 June 1992	6 October 1993	CAT/C/16/Add.3
Romania	17 January 1991	16 January 1992	4 February 1992	CAT/C/16/Add.1
Venezuela	28 August 1991	27 August 1992	8 July 1998	CAT/C/16/Add.8
Yemen	5 December 1991	4 December 1992		
Yugoslavia	10 October 1991	9 October 1992	20 January 1998	CAT/C/16/Add.7
Initial reports due in 1993 (8)				
Benin	11 April 1992	10 April 1993		
Bosnia and Herzegovina	6 March 1992	5 March 1993		
Cambodia	14 November 1992	13 November 1993		
Cape Verde	4 July 1992	3 July 1993		
Czech Republic	1 January 1993	31 December 1993	18 April 1994	CAT/C/21/Add.2
Latvia	14 May 1992	13 May 1993		
Monaco	5 January 1992	4 January 1993	14 March 1994	CAT/C/21/Add.1
Seychelles	4 June 1992	3 June 1993		

State party	Date of entry into force	Initial report due	Date of submission	Symbol
Initial reports due in 1994 (8)				
Antigua and Barbuda	18 August 1993	17 August 1994		
Armenia	13 October 1993	12 October 1994	20 April 1995 and 21 December 1995	CAT/C/24/Add.4 and Rev.1
Burundi	20 March 1993	19 March 1994		
Costa Rica	11 December 1993	10 December 1994		
Mauritius	8 January 1993	7 January 1994	10 May 1994 1 March 1995	CAT/C/24/Add.1 and 3
Morocco	21 July 1993	20 July 1994	29 July 1994	CAT/C/24/Add.2
Slovakia	28 May 1993	27 May 1994	4 May 2000	CAT/C/24/Add.6
Slovenia	15 August 1993	14 August 1994	10 August 1999	CAT/C/24/Add.5
Initial reports due in 1995 (7)				
Albania	10 June 1994	9 June 1995		
Ethiopia	13 April 1994	12 April 1995		
Georgia	25 November 1994	24 November 1995	4 June 1996	CAT/C/28/Add.1
Namibia	28 December 1994	27 December 1995	23 August 1996	CAT/C/28/Add.2
Sri Lanka	2 February 1994	1 February 1995	27 October 1997	CAT/C/28/Add.3
The former Yugoslav Republic of Macedonia	12 December 1994	11 December 1995	22 May 1998	CAT/C/28/Add.4
United States of America	20 November 1994	19 November 1995	15 October 1999	CAT/C/28/Add.5
Initial reports due in 1996 (6)				
Chad	9 July 1995	8 July 1996		
Cuba	16 June 1995	15 June 1996	15 November 1996	CAT/C/32/Add.2
Republic of Korea	8 February 1995	7 February 1996	10 February 1996	CAT/C/32/Add.1
Republic of Moldova	28 December 1995	27 December 1996		
Tajikistan	10 February 1995	9 February 1996		
Uzbekistan	28 October 1995	27 October 1996	18 February 1999	CAT/C/32/Add.3
Initial reports due in 1997 (8)				
Azerbaijan	15 September 1996	14 September 1997	18 December 1998	CAT/C/37/Add.3
Côte d'Ivoire	17 January 1996	16 January 1997		
Democratic Republic of the Congo	17 April 1996	16 April 1997		
El Salvador	17 July 1996	16 July 1997	5 July 1999	CAT/C/37/Add.4
Iceland	22 November 1996	21 November 1997	12 February 1998	CAT/C/37/Add.2
Kuwait	7 April 1996	6 April 1997	5 August 1997	CAT/C/37/Add.1
Lithuania	2 March 1996	1 March 1997		
Malawi	11 July 1996	10 July 1997		
Initial reports due in 1998 (4)				
Honduras	4 January 1997	3 January 1998		
Kenya	23 March 1997	22 March 1998		
Kyrgyzstan	5 October 1997	4 October 1998	9 February 1999	CAT/C/42/Add.1
Saudi Arabia	22 October 1997	21 October 1998		

State party	*Date of entry into force*	*Initial report due*	*Date of submission*	*Symbol*
Initial reports due in 1999 (6)				
Bahrain	5 April 1998	4 April 1999		
Bangladesh	4 November 1998	3 November 1999		
Indonesia	27 November 1998	26 November 1999		
Kazakhstan	25 September 1998	24 September 1999		
Niger	4 November 1998	3 November 1999		
Zambia	6 November 1998	5 November 1999		
Initial reports due in 2000 (8)				
Belgium	25 July 1999	25 July 2000		
Bolivia	12 May 1999	11 May 2000	16 May 2000	CAT/C/52/Add.1
Burkina Faso	3 February 1999	2 February 2000		
Japan	29 July 1999	29 July 2000		
Mali	28 March 1999	27 March 2000		
Mozambique	14 October 1999	14 October 2000		
South Africa	9 January 1999	8 January 2000		
Turkmenistan	25 July 1999	25 July 2000		

B. Second periodic reports

State party	*Second periodic report due*	*Date of submission*	*Symbol*
Second periodic reports due in 1992 (26)			
Afghanistan	25 June 1992		
Argentina	25 June 1992	29 June 1992	CAT/C/17/Add.2
Austria	27 August 1992	12 October 1998	CAT/C/17/Add.21
Belarus	25 June 1992	15 September 1992	CAT/C/17/Add.6
Belize	25 June 1992		
Bulgaria	25 June 1992	19 June 1998	CAT/C/17Add.19
Cameroon	25 June 1992	20 November 1999	CAT/C/17/Add.22
Canada	23 July 1992	11 September 1992	CAT/C/17/Add.5
Denmark	25 June 1992	22 February 1995	CAT/C/17/Add.13
Egypt	25 June 1992	13 April 1993	CAT/C/17/Add.11
France	25 June 1992	19 December 1996	CAT/C/17/Add.18
Hungary	25 June 1992	23 September 1992	CAT/C/17/Add.8
Luxembourg	28 October 1992	3 August 1998	CAT/C/17/Add.20
Mexico	25 June 1992	21 July 1992 and 28 May 1996	CAT/C/17/Add.3 and Add.17
Norway	25 June 1992	25 June 1992	CAT/C/17/Add.1
Panama	22 September 1992	21 September 1992	CAT/C/17/Add.7
Philippines	25 June 1992		
Russian Federation	25 June 1992	17 January 1996	CAT/C/17/Add.15
Senegal	25 June 1992	27 March 1995	CAT/C/17/Add.14
Spain	19 November 1992	19 November 1992	CAT/C/17/Add.10
Sweden	25 June 1992	30 September 1992	CAT/C/17/Add.9
Switzerland	25 June 1992	28 September 1993	CAT/C/17/Add.12
Togo	17 December 1992		
Uganda	25 June 1992		
Ukraine	25 June 1992	31 August 1992	CAT/C/17/Add.4
Uruguay	25 June 1992	25 March 1996	CAT/C/17/Add.16

State party	Second periodic report due	Date of submission	Symbol
Second periodic reports due in 1993 (9)			
Chile	29 October 1993	16 February 1994	CAT/C/20/Add.3
China	2 November 1993	2 December 1995	CAT/C/20/Add.5
Colombia	6 January 1993	4 August 1995	CAT/C/20/Add.4
Ecuador	28 April 1993	21 April 1993	CAT/C/20/Add.1
Greece	4 November 1993	6 December 1993	CAT/C/20/Add.2
Guyana	17 June 1993		
Peru	5 August 1993	20 January 1997	CAT/C/20/Add.6
Tunisia	22 October 1993	10 November 1997	CAT/C/20/Add.7
Turkey	31 August 1993		
Second periodic reports due in 1994 (11)			
Algeria	11 October 1994	23 February 1996	CAT/C/25/Add.8
Australia	6 September 1994	19 October 1999	CAT/C/25/Add.11
Brazil	27 October 1994		
Finland	28 September 1994	11 September 1995	CAT/C/25/Add.7
Guinea	8 November 1994		
Italy	10 February 1994	20 July 1994	CAT/C/25/Add.4
Libyan Arab Jamahiriya	14 June 1994	30 June 1994	CAT/C/25/Add.3
Netherlands	19 January 1994	14/4/94 and 16/6/94	CAT/C/25/Add.1, and
	27 March 1995	2 and 5	
Poland	24 August 1994	7 May 1996	CAT/C/25/Add.9
Portugal	10 March 1994	7 November 1996	CAT/C/25/Add.10
United Kingdom of Great Britain and Northern Ireland	6 January 1994	25 March 1995	CAT/C/25/Add.6
Second periodic reports due in 1995 (7)			
Germany	30 October 1995	17 December 1996	CAT/C/29/Add.2
Guatemala	3 February 1995	13 February 1997	CAT/C/29/Add.3
Liechtenstein	1 December 1995	3 September 1998	CAT/C/29/Add.5
Malta	12 October 1995	29 September 1998	CAT/C/29/Add.6
New Zealand	8 January 1995	25 February 1997	CAT/C/29/Add.4
Paraguay	10 April 1995	10 July 1996	CAT/C/29/Add.1
Somalia	22 February 1995		
Second periodic reports due in 1996 (10)			
Croatia	7 October 1996	5 March 1998	CAT/C/33/Add.4
Cyprus	16 August 1996	12 September 1996	CAT/C33/Add.1
Estonia	19 November 1996		
Israel	1 November 1996	6 December 1996 and 7 February 1997 (special report)	C/33/Add.2/Rev.1
		26 February 1998	CAT/C/33/Add.3
Jordan	12 December 1996		
Nepal	12 June 1996		
Romania	16 January 1996		
Venezuela	27 August 1996		
Yemen	4 December 1996		
Yugoslavia	9 October 1996		

State party	*Second periodic report due*	*Date of submission*	*Symbol*
Second periodic reports due in 1997 (8)			
Benin	10 April 1997		
Bosnia and Herzegovina	5 March 1997		
Cambodia	13 November 1997		
Cape Verde	3 July 1997		
Czech Republic	31 December 1997	14 February 2000	CAT/C/38/Add.1
Latvia	13 May 1997		
Monaco	4 January 1997		
Seychelles	3 June 1997		
Second periodic reports due in 1998 (8)			
Antigua and Barbuda	17 August 1998		
Armenia	12 October 1998	15 June 1999	CAT/C/43/Add.3
Burundi	19 March 1998		
Costa Rica	10 December 1998		
Mauritius	7 January 1998	8 June 1998	CAT/C/43/Add.1
Morocco	20 July 1998	2 September 1998	CAT/C/43/Add.2
Slovakia	27 May 1998		
Slovenia	14 August 1998		
Second periodic reports due in 1999 (7)			
Albania	9 June 1999		
Ethiopia	12 April 1999		
Georgia	24 November 1999	15 November 1999	CAT/C/48/Add.1
Namibia	27 December 1999		
Sri Lanka	1 February 1999		
The former Yugoslav Republic of Macedonia	11 December 1999		
United States of America	19 November 1999		
Second periodic reports due in 2000 (6)			
Chad	8 July 2000		
Cuba	15 June 2000		
Republic of Korea	7 February 2000		
Republic of Moldova	27 December 2000		
Tajikistan	9 February 2000		
Uzbekistan	27 October 2000		

C. Third periodic reports

State party	*Third periodic report due*	*Date of submission*	*Symbol*
Third periodic reports due in 1996 (26)			
Afghanistan	25 June 1996		
Argentina	25 June 1996	26 September 1996	CAT/C/34/Add.5
Austria	27 August 1996		
Belarus	25 June 1996	29 September 1999	CAT/C/34/Add.12
Belize	25 June 1996		
Bulgaria	25 June 1996		
Cameroon	25 June 1996		
Canada	23 July 1996	19 October 1999	CAT/C/34/Add.13
Denmark	25 June 1996	5 July 1996	CAT/C/34/Add.3
Egypt	25 June 1996	30 October 1998	CAT/C/34/Add.11
France	25 June 1996		
Hungary	25 June 1996	21 April 1998	CAT/C/34/Add.10
Luxembourg	28 October 1996		
Mexico	25 June 1996	25 June 1996	CAT/C/34/Add.2
Norway	25 June 1996	6 February 1997	CAT/C/34/Add.8
Panama	22 September 1996	19 May 1997	CAT/C/34/Add.9
Philippines	25 June 1996		
Russian Federation	25 June 1996		
Senegal	25 June 1996		
Spain	19 November 1996	18 November 1996	CAT/C/34/Add.7
Sweden	25 June 1996	23 August 1996	CAT/C/34/Add.4
Switzerland	25 June 1996	7 November 1996	CAT/C/34/Add.6
Togo	17 December 1996		
Uganda	25 June 1996		
Ukraine	25 June 1996	19 June 1996	CAT/C/34/Add.1
Uruguay	25 June 1996		
Third periodic reports due in 1997 (9)			
Chile	29 October 1997		
China	2 November 1997	5 May 1999	CAT/C/39/Add.2
Colombia	6 January 1997		
Ecuador	28 April 1997		
Greece	4 November 1997	29 November 1999	CAT/C/39/Add.3
Guyana	17 June 1997		
Peru	5 August 1997	12 December 1998	CAT/C/39/Add.1
Tunisia	22 October 1997		
Turkey	31 August 1997		
Third periodic reports due in 1998 (11)			
Algeria	11 October 1998		
Australia	6 September 1998		
Brazil	27 October 1998		
Finland	28 September 1998	16 November 1998	CAT/C/44/Add.6
Guinea	8 November 1998		
Italy	10 February 1998	22 July 1998	CAT/C/44/Add.2
Libyan Arab Jamahiriya	14 June 1998	2 September 1998	CAT/C/44/Add.3
Netherlands	19 January 1998	3 September 1998 and 27 December 1999	CAT/C/44/Add.4 and 8
Poland	24 August 1998	11 November 1998	CAT/C/44/Add.5
Portugal	10 March 1998	2 February 1999	CAT/C/44/Add.7
United Kingdom of Great Britain and Northern Ireland	6 January 1998	2 April 1998	CAT/C/44/Add.1

State party	*Third periodic report due*	*Date of submission*	*Symbol*
Third periodic reports due in 1999 (7)			
Germany	30 October 1999		
Guatemala	3 February 1999	18 January 2000	CAT/C/49/Add.2
Liechtenstein	1 December 1999		
Malta	12 October 1999		
New Zealand	8 January 1999		
Paraguay	10 April 1999	14 June 1999	CAT/C/49/Add.1
Somalia	22 February 1999		
Third periodic reports due in 2000 (10)			
Croatia	7 October 2000		
Cyprus	16 August 2000		
Estonia	19 November 2000		
Israel	1 November 2000		
Jordan	12 December 2000		
Nepal	12 June 2000		
Romania	16 January 2000		
Venezuela	27 August 2000		
Yemen	4 December 2000		
Yugoslavia	9 October 2000		

D. Fourth periodic reports

Fourth periodic reports due in 2000 (26)			
Afghanistan	25 June 2000		
Argentina	25 June 2000		
Austria	27 August 2000		
Belarus	25 June 2000		
Belize	25 June 2000		
Bulgaria	25 June 2000		
Cameroon	25 June 2000		
Canada	23 July 2000		
Denmark	25 June 2000		
Egypt	25 June 2000		
France	25 June 2000		
Hungary	25 June 2000		
Luxembourg	28 October 2000		
Mexico	25 June 2000		
Norway	25 June 2000		
Panama	22 September 2000		
Philippines	25 June 2000		
Russian Federation	25 June 2000		
Senegal	25 June 2000		
Spain	19 November 2000		
Sweden	25 June 2000		
Switzerland	25 June 2000		
Togo	17 December 2000		
Uganda	25 June 2000		
Ukraine	25 June 2000		
Uruguay	25 June 2000		

Annex VII

Country rapporteurs and alternate rapporteurs for the reports of States parties considered by the Committee at its twenty-third and twenty-fourth sessions

A. Twenty-third session

Report	*Rapporteur*	*Alternate*
Malta: second periodic report (CAT/C/29/Add.6)	Mr. Mavrommatis	Mr. El Masry
Austria: second periodic report (CAT/C/17/Add.21)	Mr. Sorensen	Mr. Yakovlev
Finland: third periodic report (CAT/C/44/Add.6)	Mr. Sorensen	Mr. Gonzalez Poblete
Peru: third periodic report (CAT/C/39/Add.1)	Mr. Burns	Mr. Mavrommatis
Azerbaijan: initial report (CAT/C/37/Add.3)	Mr. Sorensen	Mr. Yakovlev
Kyrgyzstan: initial report (CAT/C/42/Add.1)	Mr. Burns	Mr. Yu Mengjia
Uzbekistan: initial report (CAT/C/32/Add.3)	Mr. Camara	Mr. Silva Henriques Gaspar

A. Twenty-fourth session

Report	*Rapporteur*	*Alternate*
Poland: third periodic report (CAT/C/44/Add.5)	Mr. El Masry	Mr. Yakovlev
Portugal: third periodic report (CAT/C/44/Add.7)	Mr. Burns	Mr. Yu Mengjia
China: Gaspar third periodic report (CAT/C/39/Add.2)	Mr. Mavrommatis	Mr. Silva Henriques
Paraguay: third periodic report (CAT/C/49/Add.1)	Mr. Gonzalez Poblete	Mr. Camara
El Salvador: Gaspar initial report (CAT/C/37/Add.4)	Mr. Gonzalez Poblete	Mr. Silva Henriques
United States of America: initial report (CAT/C/28/Add.5)	Mr. Burns	Mr. El Masry
Netherlands: third periodic report (CAT/C/44/Add.4 and 8)	Mr. Yu Mengjia	Ms. Gaer
Slovenia: initial report (CAT/C/24/Add.5)	Mr. Yakovlev	Ms. Gaer

Annex VIII

Views and decisions of the Committee against Torture under article 22 of the Convention

A. Views

1. Communication No. 60/1996

Submitted by:	Khaled Ben M'Barek
Alleged victim:	Faisal Baraket (deceased)
State party:	Tunisia
Date of communication:	6 November 1996

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 10 November 1999,

Having concluded its consideration of communication No. 60/1996, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication and the State party,

Adopts its views under article 22, paragraph 7, of the Convention.

1. The author of the communication is Mr. Khaled Ben M'Barek, a Tunisian national currently residing in France, where he enjoys refugee status. He submits a written authorization from Jamel Baraket, the elder brother of Faisal Baraket (deceased), to act on his behalf. He claims that Faisal Baraket and his family are victims of violations by Tunisia of articles 2, 11, 12, 13 and 14 of the Convention.

The facts as submitted by the author

2.1 The author affirms that Faisal Baraket, together with others, was arrested on the morning of 8 October 1991 by members of the Criminal Investigation Brigade of the Nabeul National Guard. Mr. Baraket was an activist in the Tunisian General Students' Union and a member of Al-Nahda, an unofficial political party. He knew that the police were looking for him and had therefore gone into

hiding. After his arrest, during which he was beaten, he was brought to the headquarters of the Brigade where he was taken to the office of Captain Abdelfattah Ladib, the officer in charge.

2.2 The author affirms that, according to the account given by fellow detainees of Faisal Baraket whom he reportedly met subsequently, in the presence of the captain and police officers Abdelkrim Zemmali, Mohamed Kabbous and Mohamed Moumni, as well as Fadhel, Salah and Taoufik (last names unknown to the author), Faisal Baraket's hands and feet were immediately bound and he was suspended between two chairs on a big stick, with his head down and the soles of his feet and his buttocks exposed, in what is commonly called the "roast chicken" position. He was then beaten. Some of the officers later threw him out into the corridor after bringing another detainee into the office. Faisal Baraket was in a very bad way and seemed to be dying. The officers nevertheless prohibited the 30 or so detainees present, including his own brother Jamel, from giving him assistance.

2.3 After half an hour, in view of the fact that he was no longer moving, two detainees were permitted to lay him on a bench and untie him. When they discovered that he was dead, they told the guard, who then informed his superior. The detainees were then separated from the victim and confined to one side of the corridor. Finally, two male nurses from Nabeul University Hospital arrived, accompanied by the general superintendent of the hospital, who supervised the removal of the corpse.

2.4 On 17 October 1991, Hedi Baraket, the father of Faisal Baraket, was taken to Tunis by the Chief of the Traffic Brigade and was informed that his son had died in a car accident. At the Charles Nicole Hospital, he was asked to identify the body. He noted that the face was disfigured and difficult to recognize. He was not permitted to see the rest of the body. He was made to sign a statement acknowledging that his son had been killed in an accident. His other son, Jamel, was still in prison at that time. At the funeral, the police brought the coffin and supervised its interment without it being opened.

2.5 The author has provided the Committee with a copy of the autopsy report drawn up by Doctors Sassi and Halleb, surgeons at Nabeul Hospital. According to the report:

> "We the undersigned, [...] appointed under order No. 745 of 11 October 1991 by the Chief of the Traffic Unit of Menzel Bouzelfa in order to undertake an examination and autopsy of the corpse of an unknown person to determine the cause of death:
>
> Bilateral mydriasis
> Presence of bruises {*illegible*} the left cheek bone, the lower lip and the chin
> Small haematoma under the scalp on the left temple
> Bruising and oedema on the right hand and the back of the right forearm
> Bruising and abrasion of the left forearm
> Extensive bruises with major oedema on the buttocks
> Bruises and abrasion on both knees
> The left leg displays two puncture wounds with no underlying osteal lesions
> Bruising and abrasions on the left leg
> Bruising on the soles of both feet
>
> "On autopsy:
>
> Cranium: absence of any fracture of the cranium, absence of any intracranial or intracerebral haematoma

No flooding of the cerebral ventricles or brain displacement

Lungs: pulmonary congestion affecting the entirety of both lungs, leaving only two segments of the upper lobe of the left lung operational

Systolic cardiac arrest; heart displays no vascular or valvular lesions

Stomach distended, contains no food

Small haematoma of the pelvis with perforation of the rectosigmoid junction

"Conclusion:

"Death would appear to have resulted from acute respiratory insufficiency related to the extensive pulmonary congestion."

2.6 The author has also provided the Committee with a copy of the report drawn up in February 1992 by Mr. Derrick Pounder, Professor of Forensic Medicine at the University of Dundee (United Kingdom) at the request of Amnesty International, which had taken an interest in the case. That report, which was prepared on the basis of the autopsy report, indicated, *inter alia*, that:

"The pattern of injuries described in the autopsy report is inconsistent with the deceased having died in a road traffic accident as a pedestrian, pedal cyclist, motor cyclist or vehicle occupant.

"The pattern of injuries indicates that they were the result of a systematic beating by one or more other persons.

"The type and pattern of injuries excludes the possibility of deliberate self-infliction.

"The autopsy report describes a "small haematoma of the pelvis with perforation of the rectosigmoid junction". Such an injury would be unlikely to occur in a road traffic accident and then only in association with severe fractures of the pelvic bones, which were not present in this instance. An injury of this type is typically the result of the insertion of a foreign object into the anus. The production of this injury would have required the forcible insertion of a foreign object for a length of 6 inches or more.

"The perforation of the rectosigmoid junction ... may cause sudden death as the result of shock and an induced abnormality of heart rhythm. Associated with a sudden death by this mechanism would be extensive pulmonary congestion (blood overloading of the lungs), as seen in this case ...

"The autopsy report describes no injury other than perforation of the rectosigmoid junction and no natural disease which might otherwise account for the death. There were bruises on the soles of both feet. Such injuries would be unusual in a road traffic death ... The only plausible explanation for the bruising of the soles of the feet is repeated blows using a heavy instrument ...

"The autopsy report describes extensive bruising with major oedema (i.e. swelling) of the buttocks. Such an injury pattern would be extremely unusual in a road traffic accident and, if present, would invariably be associated with fractures of the underlying bones, which were not present in this instance. The only plausible explanation for the bruising to the buttocks is repeated blows ...

"In summary, the autopsy report reveals that this man died as the result of the forceful insertion of a foreign object at least 6 inches into the anus. Prior to his death, he had been beaten about the

soles of his feet and buttocks. Other scattered injuries to the body are consistent with further blows. The entire pattern of injury is that of a systematic physical assault and very strongly corroborates the allegation of ill-treatment and torture that has been made. The injury pattern as a whole and the injuries to the anus, feet and buttocks in particular are incompatible with involvement in a road traffic accident and this explanation for the death has no credibility in the light of the autopsy findings."

2.7 The author states that he visited the two principal witnesses to Faisal's death (names provided) some months after the incident. They said that Faisal had died in their arms at the Brigade's headquarters. The author, a trade unionist, was himself subsequently arrested on 15 May 1992 by the same Brigade and was detained at the same location as the victim. He was sentenced to five months' imprisonment. He states that his detention gave him the opportunity to meet witnesses to Faisal's death, who corroborated what the first witnesses had said, namely that Faisal had died under torture. After his release, while he was still under house arrest, the author left Tunisia and was granted asylum in France.

2.8 The author has provided a copy of a report dated 13 July 1992 by the Higher Committee for Human Rights and Fundamental Freedoms (Driss Commission) containing the following reference to the Baraket case:

"The investigating commission had concluded, in its report dated 11 September 1991, that a number of deaths had occurred in obscure and suspicious circumstances.

...

"Two other cases came to light after the Investigating Commission had completed its work.

"- concerning Faisal Baraket, the record of the preliminary investigation indicates that he met his death in a road accident. This was reported by the police to the prosecutor's office, which entrusted an investigation (No. 13458) to the examining magistrate attached to the Court of First Instance at Grombalia.

...

"We think that these two incidents also occurred in suspicious circumstances and that, in spite of the fact that the two corresponding cases have been closed, it appears that new evidence has emerged which warrants the opening of a new inquiry on the matter in accordance with article 36 of the Code of Criminal Procedure."

2.9 The author claims that the victim's family cannot avail itself of the domestic remedies offered to it in Tunisia because it fears retaliation by the police. On 11 December 1991, the author sent an anonymous letter to the Prosecutor of the Republic in the town of Grombalia in which he reported the crime, identified the victim and the police officers responsible and specified the circumstances in which the victim died. He also wrote to the Minister of Justice, his deputies and the national and international media. However, the death of Faisal Baraket was never investigated.

2.10 From October 1991 onwards, non-governmental organizations such as Amnesty International,[4] the World Organization against Torture, Action of Christians for the Abolition of Torture (France) and the Association for the Prevention of Torture (Switzerland) also requested the Government of Tunisia to investigate the death. However, the Government has always maintained that the death resulted from a road accident.

2.11 In a judgement dated 2 October 1996, the Tunis Appeal Court awarded damages amounting to 12,000 dinars to the Baraket family in compensation for Faisal's death in a road accident. The content of the verdict was communicated to the family by a lawyer, Mohamed El Marhoul, who affirmed in his letter that it was the father of Faisal Baraket who had initially commissioned him to act in that matter. However, the author emphasizes that, contrary to the said lawyer's affirmation, the Baraket family had never instituted proceedings in that regard.

The complaint

3.1. The author claims that the Government of Tunisia has violated the following articles of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> Article 2, paragraph 1: The State party not only failed to take effective measures to prevent torture, but also concealed the facts and denied that acts of torture had been committed.
>
> Article 11: The authorities used their supervisory powers not to prevent torture but to hide the truth.
>
> Article 12: The State party claims that the investigation into Faisal Baraket's death was closed and, although it promised in 1992 that it would reopen the case, no investigation has been conducted.
>
> Article 13: The State party forced the victim's father to sign a statement acknowledging that his son died in an accident, while keeping his other son Jamel in detention for six months after his brother's death.
>
> Article 14: The State party still denies that Faisal Baraket died under torture; his family therefore cannot claim compensation.

3.2 The author also affirms that the police officers who tortured Faisal Baraket have remained in their posts and some of them have even been promoted.

3.3 The author repeatedly expresses his concern about the safety not only of the Baraket family but also of the witnesses and their families following incidents which he considers to be related to the presentation of the communication to the Committee.

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[4] A summary of the allegations relating to the Baraket case appears in Amnesty International document MDE 30/04/92 dated March 1992.

Proceedings before the Committee

4.1 In its decision of 5 May 1995, the Committee declared the author's communication No. 14/1994 inadmissible on the ground that he had not submitted sufficient evidence to establish his right to act on behalf of the alleged victim.[b] However, the decision stipulated that the Committee could receive and consider a new communication submitted by any person whose right to act had been duly established.

4.2 On 6 November 1997, the author submitted a new communication, which the Committee transmitted to the State party on 23 January 1997 as No. 60/1996 and in which the Committee requested the State party to ensure that the author and his family, the alleged victim's family and the witnesses and their families were not subjected to any ill-treatment.

Observations of the State party concerning admissibility

5.1 The State party maintains that the communication contains comments that are insulting and injurious to the Tunisian State and its institutions and are obviously politically motivated, thereby constituting an abuse of the right to submit such communications. It further indicates that the domestic remedies have not been exhausted.

5.2 The State party objects to the Committee's request to take measures to protect Mr. Jamel Baraket and his family, considering that request as implying that the Committee has already taken a decision on the question of the admissibility of the communication.

5.3 The State party expresses doubts concerning the authenticity of the power of attorney granted to the author by Jamel Baraket, the alleged victim's brother. In that regard, it points out that, in his first communication, the author submitted a power of attorney from the alleged victim's father although the latter had made an authenticated statement to the Government in which he denied having granted such power of attorney.

5.4 The State party submits that the author's undeclared aims are political and that he belongs to an extremist movement, on account of which he was sentenced to three months' imprisonment in Tunisia.

5.5 Concerning the exhaustion of domestic remedies, the State party disputes the author's claim that remedies either do not exist or are ineffective. According to the Penal Code, the statutory time limit for criminal prosecution is 10 years and the public right of action is therefore not extinguished. Moreover, that time limit can also be suspended or reset whenever a new investigation is opened. The Office of the Public Prosecutor had, on its own initiative, twice reopened a judicial investigation and could order a reopening of the investigation at any time whenever it was notified of new evidence or developments that might help to discover the truth.

5.6 The State party indicates that the alleged victim's father brought a civil action for damages in connection with his son's death in a hit-and-run accident. The claimant in that case was represented by Mr. Mohamed Ahmed El Marhoul. In a judgement dated 9 October 1995, the Court of First Instance at Grombalia ordered the Chief of the State Litigation Department (as the legal representative of the Compensation Fund for the Victims of Traffic Accidents) to pay a sum of 10,000 dinars to the alleged victim's father in compensation for the mental pain and anguish that he had suffered. On 2 October 1996, the Court of Appeal upheld that judgement and increased the amount of compensation to 12,000 dinars.

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[b] CAT/C/14/D/14/1994.

5.7 The State party maintains that the alleged victim's beneficiaries are completely free to avail themselves of the domestic remedies before the Tunisian courts without the risk of any threat or act of reprisal, contrary to the author's allegations. However, although they instructed a lawyer to defend their interests before the Tunisian courts, they have shown no interest in taking this matter outside the domestic channels of recourse.

Comments by the author

6.1 The author refers to the Committee's request to the State party to ensure the safety of the witnesses and their families and notes that the wife of one of the witnesses has been in prison since 23 May 1996 on political charges relating to meetings allegedly held in 1989, even though she is a simple housewife.

6.2 The author denies belonging to an extremist movement or acting on behalf of anyone except Jamel Baraket and his family. He has presented the Committee with a power of attorney dated 5 December 1994, signed by the victim's father and confirmed on 7 November 1995 by the brother when the father's health had deteriorated. He maintains that Jamel Baraket is the person legally responsible for his family, that he has a close relationship with him, that Jamel's letters are authentic and that the State party has not proved the documents to be forgeries.

6.3 The author emphasizes the fact that domestic remedies cannot be exhausted because of the risk of reprisals. He refers to the inquiries that have been opened and subsequently closed by the Office of the Public Prosecutor and claims that no serious criminal proceedings were ever instituted.

6.4 With regard to the civil proceedings, the author points out that, by law, in order to lodge an appeal against the State Litigation Department under the terms of the legislation concerning the Compensation Fund for the Victims of Road Accidents, anyone filing a complaint against an unidentified culprit must first of all: (i) have filed a claim for damages with the Fund not later than one year after the accident in question; (ii) have reached a settlement with the Fund or, failing such settlement, have filed a complaint against it. In the case in question, in the absence of a complaint or a judgement no prosecution was possible.

6.5 He also claims that the father did not commission any lawyer and that the family, including his client Jamel Baraket, never recognized the action for damages that was brought on behalf of Mr. Hedi Baraket. However, they were forced to put up with it in order to protect themselves against the reactions of those who had brought the action in their name with a view to presenting it to the Committee as an operative domestic remedy. The author notes that, in practice, proceedings of that type very rarely succeed and, when they do, it is only after many years. However, the Baraket case was heard in two years, including the appeal, which is astonishing.

Decision of the Committee on admissibility

7.1 The Committee considered the admissibility of the communication at its nineteenth session and by its decision of 17 November 1997 found it to be admissible.

7.2 The Committee referred to article 22, paragraph 1, of the Convention and to rule 107, paragraph 1 (b), of its rules of procedure, which allow a communication to be submitted on behalf of an alleged victim if the author can justify acting on his behalf. The Committee found that the author, having submitted a written authorization signed by the brother of the alleged victim, had duly established his right to represent the alleged victim's family before the Committee. In this regard, the Committee noted that

the State party had expressed doubts about the genuineness of the written authorization but had not presented sufficient evidence to conclude that the document signed by the alleged victim's brother was a forgery.

7.3 Concerning the exhaustion of domestic remedies, the Committee found that the State party had not given sufficient details about the criminal proceedings that could be taken in order to establish whether the remedies would be effective. It noted that, although criminal proceedings had been initiated, the file had been closed. It also noted that the reports to the effect that the Tunisian courts had awarded damages to the family in compensation for the accident of which Faisal Baraket was a victim placed in doubt the existence of an effective remedy based on a complaint of torture. The Committee therefore found that it was not prevented from considering the communication by article 22, paragraph 5 (b), of the Convention.

7.4 The Committee had ascertained, as it was required to do under article 22, paragraph 5 (a), of the Convention, that the same matter had not been and was not being examined under another procedure of international investigation or settlement.

State party's observations on the merits of the communication

8.1 The State party regrets the Committee's decision to find the communication admissible and notes the questionable nature of the arguments advanced to justify this decision. Faisal Baraket's family consists of his mother and five brothers, including Jamel Baraket. As has already been observed, Faisal Baraket's father, while he was still alive, refused to authorize the author of the communication to bring legal proceedings of any kind. The legal representation which is required in a matter as serious as alleged murder necessitates that authority to bring proceedings before the Committee should be granted by all of the alleged victim's next of kin. An allegation made by one person out of eight is not sufficient to raise serious doubt about the cause of death.

8.2 Moreover, it appears that the Committee is prepared to admit that the author of the communication is not entitled to bring proceedings unless the Government of Tunisia can prove that the power of attorney signed by the alleged victim's brother is a forgery. Such a requirement is inconsistent with the smooth operation of an objective procedure designed exclusively to discover the truth on the basis of solid and corroborating evidence. In this instance, the Committee itself would seem to be in the best position to verify the authenticity of the documentation transmitted to it.

8.3 The State party has submitted the following facts concerning the death of Faisal Baraket on a number of occasions.

8.4 On 11 October 1991 an anonymous telephone caller informed the National Guard station at Menzel Bouzelfa that there had been a road traffic accident on route 26 between Ghrabi and Grombalia. Police officers found the victim alive at the scene. He was taken to Nabeul regional hospital but died the same day. His identity remained a mystery for four days, until fingerprint identification on 15 October 1991 revealed him to be Faisal Baraket. The autopsy report found the cause of death to be acute respiratory insufficiency related to extensive pulmonary congestion.

8.5 Following referral of the case, the Public Prosecutor's Office began a manslaughter investigation against X on 6 November 1991 in connection with the hit-and-run road traffic accident. On 30 March 1992, given the impossibility of identifying the culprit, the examining magistrate ordered the case to be closed until further notice.

8.6 On 15 October 1992 the Tunisian Ministry of Foreign Affairs sent a letter to Amnesty International stating that "with regard to the case of Faisal Baraket ... the reopening of which had been requested by the 'Driss Commission' and your own organization, the Tunisian authorities have forwarded to the Public Prosecutor attached to the Court of First Instance at Grombalia the medical report which you transmitted to the Government." The Public Prosecutor's Office ordered the case to be reopened on 22 September 1992.

8.7 Pursuant to the examining magistrate's decision to order a new expert medical opinion, three professors of forensic medicine including Dr. Ghachem were appointed to examine the content of the autopsy report and the conclusions put forward by Professor Pounder. Their report, a copy of which has been forwarded to the Committee, states that "the autopsy report fails to mention the presence of any traumatic lesion to the anus itself. Yet the forced introduction of a foreign body unavoidably leaves lesions in the area of the anus and sphincter. The autopsy report ... refers to the presence of superficial lesions and a visceral lesion. None of the lesions described in the report permits the cause of injury to be accurately determined. The description of the lesions is very vague and incomplete and does not help to determine their origin. The conclusions reached by Professor Pounder cannot therefore be substantiated since they are not based on objective facts, the lesions referred to in the report being of a very imprecise nature." Once again, the case was closed for lack of evidence.

8.8 Following the submission of communication No. 14/1994 to the Committee, the Public Prosecutor's Office attached to the Court of First Instance at Grombalia ordered the case to be reopened. The examining magistrate immediately proceeded to examine the persons named by the author. Mr. Hedi Baraket stated that he did not know the author, nor had he ever met him; he also denied the allegations contained in the communication. A deposition to this effect was signed by Mr. Hedi Baraket and forwarded to the Committee. Three so-called witnesses who, according to the author, were purportedly present at the death of Faisal Baraket have denied knowing either the author or the alleged victim, and they further deny having witnessed scenes of torture. A fourth individual stated that he was bribed by the author. In exchange for a sum of money, he agreed to make a tape recording of a text prepared by the author. Finally, the general superintendent at Nabeul Hospital stated that he had never gone to the police station to help the victim. The examining magistrate therefore decided that there were no grounds for pursuing the matter.

8.9 Faisal Baraket's relatives have never sued for damages in civil proceedings. For this reason, they have never contested the two decisions to close the case. Furthermore, article 5 of the Tunisian Code of Criminal Procedure stipulates that the statutory time limit for criminal prosecution is 10 years from the date of commission of the offence charged. This period may be suspended or reset whenever a new inquiry is opened. Relatives are entitled to submit new material of any kind in order to persuade the Public Prosecutor's Office to reopen the judicial investigation.

8.10 The State party indicates that on 16 November and 10 December 1991 Faisal Baraket's parents filed separate applications with the Grombalia Public Prosecutor's Office challenging the arbitrary detention and disappearance of their son Jamel Baraket. Both of these applications were successful. Given that they were able to take such steps without incurring the reprisals predicted by the author, by the same token they were entirely at liberty to raise the matter of Faisal Baraket had they been convinced that he had been tortured to death. But no complaint of torture has ever been filed with the Tunisian courts. Criminal investigations to discover the truth in this matter have been initiated by the Public Prosecutor's Office.

8.11 The State party reports that the Ministry of Foreign Affairs requested the Ministry of Public Health to commission a second report from Professor Ghachem on the conclusions of his initial report. This second report, a copy of which has been sent to the Committee, states:

"While it is true that the description of the lesions referred to in the autopsy report is imprecise and their origin is not explained, it is nevertheless the case that the conclusions reached by Professor Pounder are not based on objective forensic evidence. This is because the forced introduction of a foreign body into the anus leaves obvious marks in this area ... The autopsy report makes no mention of any traumatic lesions to the anus. ... Nevertheless, I am also of the opinion that an exchange of views and a discussion with Professor D.J. Pounder and Professor S. Sassi regarding this case would be very useful."

8.12 The State party has also provided a French translation of an excerpt from a sworn deposition made by Dr. Sassi before the examining magistrate. The relevant passage reads:

"It has been ascertained that there was a rupture of the large intestine in the area of the pelvis and the infiltration of waste products from the large intestine into the body caused a blood infection which in turn led to insufficiency of the respiratory apparatus, the direct cause of death. Dr. Sassi explained to us that the rupture of the large intestine was due to an acute traumatism which could have resulted from the collision between the victim and a solid body. This could have been the result of a road traffic accident involving a motor vehicle."

8.13 Regarding the question of civil proceedings, the State party emphasizes that Faisal Baraket's father did indeed bring a civil action for damages in connection with his son's death in a road traffic accident; from March 1995 he was represented in this action by Mr. Ahmed El Marhoul. The judgement in this case became final and enforceable following an appeal by the parties. Counsel proceeded to enforce the judgement. The author has provided no convincing explanation as to why one of the beneficiaries has received the sum due to him, thereby unambiguously indicating that Mr. Marhoul has performed his proper function.

8.14 The State party takes issue with the Committee's contention in its decision on admissibility that insufficient details were provided regarding the criminal proceedings that may be taken. The State party stresses that it has submitted detailed records of the proceedings and investigations conducted on two occasions by the competent examining magistrate. It is astonished to find that, in the Committee's view, the remedy for alleged torture cannot be considered "effective" unless it results in a trial and subsequent conviction. If this were the case, investigative procedures – an indispensable component of criminal proceedings – would simply be a means to realize this end, whereas it is well established both in fact and in law that the examining magistrate must conduct his investigations with a view to indictment or acquittal.

Comments by the author

9.1 The author recalls that in 1992 the Higher Committee for Human Rights and Fundamental Freedoms transmitted a report to the President of the Republic in which it expressed the view that the death of Faisal Baraket had occurred in suspicious circumstances and that, in spite of the case being closed, new evidence had seemingly come to light which would warrant the opening of a new inquiry. The State party has not indicated what evidence led the official government commission to form this view.

9.2 The author has transmitted to the Committee a copy of a letter dated 20 July 1994 which was sent to the President of the Movement against Racism and for Friendship among Peoples, a foreign non-governmental organization which has taken an interest in the case, via the Tunisian ambassador to France. The ambassador did not mention the road traffic accident hypothesis and placed the case in the context of promoting human rights and strengthening democratic structures in Tunisia. The author notes that the State party has not provided an explanation for this letter.

9.3 The State party claims to have reopened the Baraket case following the transmission of communication No. 14/1994, and to have summoned for questioning the witnesses named by the author. In fact, the police officers concerned have never been questioned or involved with the inquiry in any way, despite the fact that the author has indicated their name and rank.

9.4 With regard to the witness who the State party says has been bribed, the author claims that the witness is a wealthy businessman and asks where he could have found the money to offer a bribe, since he himself has no money to give. This same witness informed the author that, when he was questioned after the reopening of the case, he was detained for over a week and the police officers involved in the Faisal Baraket case were present during his detention. This is the witness whose wife was arrested in 1996.[5] Finally, the general superintendent at Nabeul Hospital is unknown to the author and has never been named by him as a "witness".

9.5 The author rejects the State party's contention that there is no connection between the imprisonment of the wife of one of the witnesses and the case under consideration. The State party has not explained to the Committee why proceedings were instituted against the wife in question. It has also failed to explain why she has been transferred to a prison far away from her family, and why her counsel is prohibited from talking to her without the presence of witnesses.

9.6 The author has forwarded a letter from Professor Pounder in which the latter states his opinion on the report compiled by Professor Ghachem and two other experts. Professor Pounder notes that the State party has not provided the text of the report[6] and states that, on the basis of the sentences which the State party has excerpted, he has not changed his opinion, namely that a road traffic accident could not explain the type of injuries which led to the death of Faisal Baraket. He reconfirmed that, in his opinion, the injury to the rectum could only have been received as a consequence of a foreign body being inserted into the anus. Furthermore, it is perfectly possible that such an injury could have been produced without causing a lesion to the anus itself.

9.7 The author has provided three other reports commissioned by Amnesty International from three professors of forensic science who evaluated the report prepared by the three experts and Professor Pounder's report. They all concur with Professor Pounder's opinion. The first, dated 6 October 1994, was drawn up by Professor Knight of the University of Wales, and states that:

> "I have studied the translation of the very short autopsy report from the Regional Hospital of Nabeul, Tunisia concerning an unnamed deceased person. I have also read the report of Professor Derrick Pounder and the extract from the Tunisian Government's response.
>
> "I must begin by saying that I agree in every particular with Professor Pounder's report and reject the government response, including the further opinion of three professors of legal medicine in Tunisia, whose comments are unacceptable.
>
> "This was a 25-year-old man and therefore in the absence of evidence to the contrary, would be expected at that age to be free of natural disease, especially in the rectum and sigmoid.

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[5] See above, para. 6.1.

[6] The full text of the report was subsequently transmitted to the Committee.

"The cause of death given on the autopsy report (which must surely be only a brief summary, as no judicial autopsy report can possibly be this short) is useless and gives no true information at all about the underlying pathology leading to the death – it is merely a statement of the terminal mode of death, not the cause and is thus of no value whatsoever.

"The autopsy reveals bruising of the soles of both feet, a perforation of the large intestine at the rectosigmoid junction, extensive bruising and oedema of the buttocks, various other bruises on the face, arms, head and legs. The only potentially fatal injury is perforation of the rectosigmoid junction. The only cause for this, in the absence of any serious stated disease such as cancer, severe colitis etc., is a perforating injury. This can only be caused, in the absence of gross abdominal injury, by an object being introduced into the rectum. This could occur without any damage to the anal margin, if a thin, pointed object, such as a thin rod was slid into the anus. Thus the objections of the three professors are unfounded, if they base their denial on the absence of anal damage. The bruising of the soles of the feet can only occur from beating in falanga. The bruising and oedema of the buttocks is typical of a beating in that area.

"I entirely concur with Professor Pounder and agree that this cannot be a "traffic accident", but is a deliberate injury to the lower intestine by the introduction of a thin weapon into the rectum, in a man who has been beaten on the feet and buttocks."

9.8 The second report, prepared by Professor Fournier of the Université René Descartes in Paris on 10 October 1994, indicates that:

"[The autopsy report], which may be described as very succinct, furnishes no evidence as to the true cause of death. ... Most of the lesions described could be ascribed to a road accident. However, two factors rule out this hypothesis:

> The perforation of the rectosigmoid junction, which cannot be accounted for in terms of a mechanism of sharp deceleration and cannot be linked to an osteal lesion of the pelvis.
>
> The lesions on the soles of both feet, which are difficult to imagine in such circumstances.

...

"The hypothesis of death by inhibition is compatible with the observations made during examination with the naked eye. This type of death, which may be observed when violence is applied but also sometimes independently of any context of violence or torture, has been described on the occasion of vaginal or rectal examination, various punctures (of the pleura, the lumbar region, etc.), or injury to the testicles, the solar plexus region or the neck. The exact mechanism of death is not known, but pulmonary congestion is usually observed. As the dossier stands, and in the absence of more precise data concerning the prior clinical state and the toxicological context, the hypothesis of death by inhibition following the deliberate and traumatic introduction of a foreign body into the rectum appears to be highly likely."

9.9 Lastly, the third report, prepared by Professor Thomsen of the University of Odense on 11 November 1994, states in relation to the autopsy report:

"The above pattern of injury is not consistent with any known type of road traffic accident. The pattern of injury is much more consistent with having been inflicted deliberately by the use of blunt violence. Thus the haemorrhages of the foot soles are very indicative of the type of torture known

as phalanga (or falaca) inflicted by the beating of the soles of the feet with clubs or similar instruments. A perforation of the rectosigmoid junction is very rarely seen without a pelvic fracture and is much more indicative of torture by the insertion of an object through the anal canal. The rest of the lesions are all consistent with the use of blunt violence in the form of beating by one or more other persons.

"The stated cause of death is almost meaningless, as congestion of the lungs is always secondary to some other pathologic state.

"Based on the available brief autopsy report it is much more likely that the cause of death was the described perforation of the bowel wall."

9.10 With regard to the civil proceedings, the legal time limits for admissibility were largely exceeded by the time proceedings were brought. The Court of Appeal not only confirmed the admissibility of the case, but also increased the damages payable to the beneficiaries. The Chief of the State Litigation Department specifically stated before the Court of Appeal that the decision of the court of first instance in favour of the victim's father had violated the law in that the alleged victim of a road traffic accident caused by an unidentified culprit must file, in writing and no more than one year from the date of the accident, a request to reach an amicable agreement with the Compensation Fund for the Victims of Road Accidents. In this case, the authorities were only apprised of the accident on 30 May 1995, or three years and five months after it occurred, thereby involving the statute of limitation.

9.11 The author states that Faisal Baraket's younger brother is the only member of the family to have been paid his share of the compensation for the road traffic accident. Jamel Baraket, who is legally responsible for the family, has instructed the author to inform the Committee that this was done without his knowledge, his brother did not act spontaneously and it has not affected the family's position. This remains unchanged, in spite of the fact that the sums awarded are sizeable in proportion to the standard of living in Tunisia and the family's very modest material situation. The family has always refused to have any dealings with the lawyer Mr. Mohamed Ahmed El Marhoul, particularly with regard to his persistent appeals that they should come to his office and collect the money. At the request of the President of the Court of First Instance, Mr. Ahmed El Marhoul should long ago have filed a warrant authorizing remittance of the sums in question to the Treasury.

9.12 The author reaffirms that the victim's parents never brought criminal proceedings because they knew for a fact that their son did not die in a road traffic accident. They also knew that the State party was acting in bad faith when it reopened and closed the same case three times in less than three years, entrusting the same people with the investigation on each occasion.

Further observations by the State party

10.1 Concerning the medical opinions advanced by Dr. Knight, Dr. Thomsen and Dr. Fournier, the State party affirms that these are not medical evaluations but comments prepared on the basis of an alternative report, which was in turn drawn up on the basis of Dr. Sassi's initial report, and which purely and simply endorsed the conclusions reached by Dr. Pounder.

10.2 The State party considers it unacceptable that the author should accuse the Tunisian judicial authorities of distorting the procedure by questioning witnesses and not suspects. A suspect becomes a suspect only when there is credible and consistent evidence and proof which may be revealed by witnesses, *inter alia*. From the standpoint of criminal procedure, examination of witnesses is necessary, before the possible questioning of the "real" suspects. In addition, the examination of witnesses is carried out

exclusively before the competent examining magistrate, in his office and without any criminal investigation officer being present.

10.3 As regards civil procedure, the State party points out a flagrant contradiction on the part of the author. On the one hand, he considers Jamel Baraket as being "legally responsible" for the entire Baraket family, while at the same time he mentions that Mohamed El Hedi is 27 years old. In Tunisia the age of majority is 20. Consequently, Jamel Baraket cannot be legally responsible for adult relatives, except where the courts have declared them legally incompetent by reason of insanity. He is not even the legal representative of his close relatives, as to date he has not cited a legally valid authorization.

10.4 The lawyer Mohamed Ahmed El Marhoul did not appear "out of the blue" in the civil proceedings, as the author claims. The father of the late Faisal Baraket, who has since died, engaged him to pursue an action for compensation following a road accident, on his behalf and on behalf of all the other heirs. None of the heirs had recourse to the law to challenge his authority. In any event, the relations between a lawyer and his clients fall within the sphere of private law and are not subject to any supervision on the part of the Government. If not all those entitled to compensation have yet received it, that is not because they have been subjected to pressure by the lawyer, but because they are being manipulated by the author of the communication.

10.5 Lastly, as regards the situation of the wife of one of the "witnesses", she has been prosecuted in keeping with normal legal procedures for offences under the ordinary law.

Consideration on the merits

11.1 The Committee has considered the communication in the light of all information made available to it by the parties concerned, in accordance with article 22, paragraph 4, of the Convention.

11.2 It also notes that the author of the communication claims that the State party has violated articles 2, 11, 12, 13 and 14 of the Convention.

11.3 Regarding articles 11 and 14, the Committee considers that the documents communicated to it furnish no proof that the State party has failed to discharge its obligations under these provisions of the Convention.

11.4 As regards article 12 of the Convention, the Committee notes first that study of the information forwarded by the parties points to the following established facts:

> The victim Faisal Baraket did indeed die no later than 11 November 1991, the date of the order for an autopsy; dying, according to the author of the communication, as a result of his arrest, or, according to the State party, as a result of a road accident caused by an unknown person.
>
> In October 1991, the State party received allegations that Faisal Baraket died as a result of torture from the following non-governmental organizations: Amnesty International, World Organization against Torture, Action of Christians for the Abolition of Torture (France) and Association for the Prevention of Torture (Switzerland).
>
> On 13 July 1992, a report prepared by the Higher Committee for Human Rights and Fundamental Freedoms, an official Tunisian body, considered Faisal Baraket's death to be suspicious and suggested that an inquiry should be begun under article 36 of the Code of Criminal Procedure.

11.5 However, only on 22 September 1992 was an inquiry ordered into these allegations of torture – over 10 months after the foreign non-governmental organizations had raised the alarm and over two months after the Driss Commission's report.

11.6 In a similar case,[8] the Committee had considered delays of three weeks and more than two months on the part of the competent authorities in reacting to allegations of torture to be excessive.

11.7 The Committee is of the view that the State party did not comply with its obligation under article 12 of the Convention to proceed to a "**prompt** ... investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction" and that there was consequently a violation of the Convention.

11.8 Concerning the investigation carried out by the competent authorities of the State party, the following acts may be regarded as having been established:

> The examining magistrate, who was entrusted with the case by the Public Prosecutor's Office on 22 September 1992, ordered a new medical evaluation, which found that it was impossible to determine the mechanism by which the lesions observed on the victim had arisen, or their origin, and dismissed the case.
>
> Assigned the case once again, following communication No. 14/1994, the magistrate examined the persons mentioned by the author of the communication. However, as all these persons denied the slightest knowledge of the alleged events, the magistrate again dismissed the case.

11.9 The Committee notes in this regard that, among other things, the examining magistrate had at his disposal the results of other important investigations which are customarily conducted in such matters, but made no use of them:

> First, notwithstanding the statements made by the witnesses mentioned, and in particular bearing in mind the possibility of incomplete recall, the magistrate could have checked in the records of the detention centres referred to whether there was any trace of the presence of Faisal Baraket during the period in question, as well as that, in the same detention centre and at the same time, of the two persons mentioned by the author of the communication as having been present when Faisal Baraket died. It is not without relevance to note in this regard that in pursuance of principle 12 of the Body of Principles for the Protection of All Persons under Any Form of

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[8] *Encarnación Blanco Abad v. Spain* (CAT/C/20/D/59/1996).

Detention or Imprisonment, adopted on 9 December 1988,[5] as well as article 13 *bis* of the Tunisian Code of Penal Procedure,[6] a record must be left of every person detained.

Next, the magistrate might have sought to identify the accused officials, examine them and arrange a confrontation between them and the witnesses mentioned, as well as the complainant.

Lastly, in view of the major disparities in the findings of the forensic officials as to the causes of some of the lesions observed on the victim, the Committee considers that it would have been wise to order the exhumation of the body in order at least to confirm whether the victim had suffered fractures to the pelvis (confirming the accident hypothesis) or whether he had not (confirming the hypothesis that a foreign object had been introduced into his anus); this should have been done, as far as possible, in the presence of non-Tunisian experts, and more particularly those who have had occasion to express a view on this matter.

11.10 The Committee considers that the magistrate, by failing to investigate more thoroughly, committed a breach of the duty of impartiality imposed on him by his obligation to give equal weight to both accusation and defence during his investigation, as did the Public Prosecutor when he failed to appeal against the decision to dismiss the case. In the Tunisian system the Minister of Justice has authority over the Public Prosecutor. The Minister could therefore have ordered him to appeal, but failed to do so.

12. Consequently, the State party breached its obligation under articles 12 and 13 of the Convention to proceed to an impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

13. In pursuance of rule 111, paragraph 5, of its rules of procedure, the Committee calls on the State party to inform it, within 90 days from the date of the communication provided for in rule 111, paragraph 3, of its rules of procedure, of the steps it has taken in response to the observations made above.

[Done in English, French, Russian and Spanish, the French text being the original version.]

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[5] Principle 12 reads:

"1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

"2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law."

[6] In its comments on the conclusions and recommendations of the Committee following its consideration of Tunisia's second periodic report the Government stated that "All departments with responsibility for places of detention are obliged to keep a special numbered register including the identities of all persons held in custody and indicating the time and date that the custody period begins and ends (article 13 *bis* of the Code of Criminal Procedure)." (A/54/44, para. 105)

2. Communication No. 63/1997

Submitted by:	Josu Arkauz Arana [represented by counsel]
Alleged victim:	The author
State party:	France
Date of communication:	16 December 1996

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 9 November 1999,

Having concluded its consideration of communication No. 63/1997, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication and the State party,

Adopts the following decision:

1.1 The author of the communication is Josu Arkauz Arana, a Spanish national. He is represented by counsel. Mr. Arkauz applied to the Committee on 16 December 1996 claiming to be a victim of violations by France of articles 3 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment because of his deportation to Spain.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the communication to the attention of the State party on 13 January 1997. At the same time, acting under rule 108, paragraph 9, of its rules of procedure, the Committee requested the State party not to expel Mr. Arkauz to Spain while his communication was being considered.

The facts as submitted by the author

2.1 The author, who is of Basque origin, states that he left Spain in 1983 following numerous arrests of persons reportedly belonging to ETA, the Basque separatist movement, by the security forces in his native village and nearby. Many of the persons arrested, some of whom were his childhood friends, were subjected to torture. During the interrogations and torture sessions, the name of Josu Arkauz Arana had been one of those most frequently mentioned. Sensing that he was a wanted person and in order to avoid being tortured, he fled. In 1984 his brother was arrested. In the course of several torture sessions the members of the security forces asked the latter questions about the author and said that Josu Arkauz Arana would be executed by the Anti-Terrorist Liberation Groups (GAL).

2.2 Several murders of Basque refugees and attempts on the lives of others took place close to where the author was working in Bayonne. The author further states that the officer in charge of the Biarritz police station summoned him in late 1984 to notify him of his fears that an attempt on his life was being prepared and that the author's administrative file, which contained all the information necessary to locate him, had been stolen. He was therefore obliged to leave his work and lead a clandestine existence. Throughout the period of his concealment, his relatives and friends were continually harassed by the Spanish security forces. In June 1987 his brother-in-law was arrested and tortured in an effort to make him reveal the author's whereabouts.

2.3 In March 1991 the author was arrested on the charge of belonging to ETA and sentenced to eight years' imprisonment for criminal conspiracy ("association de malfaiteurs"). He began serving his sentence in Saint-Maur prison and was due to be released on 13 January 1997. However, on 10 July 1992, he was further sentenced to a three-year ban from French territory. He filed an appeal against the decision to ban him with the Paris Court of Major Jurisdiction in October 1996, but no action was taken.

2.4 On 15 November 1996 the Ministry of the Interior commenced a proceeding for the author's deportation from French territory. A deportation order can be enforced by the administration ex officio and means that the person concerned is automatically taken to the border. The author applied to the Administrative Court of Limoges on 13 December 1996 requesting the annulment of the deportation order which might be made out against him and a stay of execution of such an order if it were to be issued. However, his application for a stay of execution was rejected by a ruling of 15 January 1997, the court having taken the view that handing over the author would not be likely to have irreversible consequences for him. An appeal from this ruling was not possible because the deportation measure had already been implemented.

2.5 On 10 December 1996 the author began a hunger strike to protest against his deportation. Later, because of his deteriorating health, the author was transferred to the local prison at Fresnes, in the Paris region, where he again went on strike, refusing to take liquids.

2.6 On 17 December 1996 the author was informed that the Deportation Board of the Indre Prefecture had rendered an opinion in favour of his deportation, considering that his presence in French territory constituted a serious threat to public order. The Board did, however, remind the Ministry of the Interior of the law stipulating that an alien could not be removed to another country where his life or liberty might be threatened or where he could be exposed to treatment contrary to article 3 of the European Convention on Human Rights. Following this opinion, a ministerial deportation order was issued on 13 January 1997 and communicated that day to the author. He was at the same time notified of a decision indicating that the order of deportation to Spain was being put into effect. The deportation measure was implemented the same day, after a medical examination had concluded that Mr. Arkauz could be transported by car to the Spanish border.

2.7 By a letter of 17 March 1997 the author informed the Committee that his deportation to Spain had taken place on 13 January 1997. He reported having been ill-treated and threatened by the French police and described the incidents which occurred in Spain after his deportation.

2.8 The author claims to have suffered greatly during the journey to Spain because of his extreme weakness. He states that while being driven from Fresnes to the Spanish border, a distance of nearly 1,000 kilometres covered in seven hours, he was seated between two police officers, with his hands cuffed behind his back, and he experienced very considerable back pain because he suffers from degenerative discopathy. The police officers are said to have stopped at one point and ordered Mr. Arkauz to get out of the vehicle. Since he was unable to move, the police officers reportedly threw him to the ground and

beat him. He adds that the police officers intimidated him throughout the journey and that the treatment to which he was subjected is contrary to article 16 of the Convention.

2.9 As soon as he had been handed over to the Spanish Civil Guard he was placed in incommunicado detention. A forensic physician is said to have examined him and pronounced him fit to travel on to Madrid under certain conditions, since his health had been very much affected by the hunger strike. He states that he was slapped on the ears and about the head during the journey of about 500 kilometres to Madrid. He also claims to have been constantly told that he would later be tortured and killed. On entering Madrid, the officials are said to have thrust his head between his knees so that he would not know where he was being taken, namely to the Civil Guard Headquarters in Madrid. He says that he fainted from exhaustion. When revived, he was reportedly subjected to long interrogation sessions. He was allegedly forced to remain seated, with his legs apart, in a position that caused him very considerable back pain. With his eyes covered, he was reportedly slapped all over his body. He was also allegedly subjected to loud hand claps and whistling close to his ears and told in detail about the methods and long sessions of torture that would be inflicted on him. At one point, the guards are said to have ripped his clothes off, while continuing to beat him. Later, with some guards holding his legs and others his arms, he was allegedly subjected to "*la bolsa*"[4] and at the same time beaten on the testicles. He reportedly then lost consciousness. When revived and still masked, he was reportedly again seated on a chair, with his legs spread apart and his arms held to his legs. The guards allegedly brought electrodes close to him. As he tried to move away, he reportedly received a direct shock.

2.10 Some officials reportedly tried to persuade him to cooperate with them, using emotional arguments concerning his wife and two children, but the author says that he refused to cooperate. He was reportedly then examined by a doctor. After the doctor left, he was reportedly masked again and beaten about the ears and the head. Another examination was made by a doctor, who reportedly stated that the author was close to suffering from tachycardia. The interrogations and threats continued and a third visit was made by the doctor some hours later. Meanwhile, his wife met the judge on 15 January 1997. She expressed fears concerning her husband's state of health and asked to see him, but this request was denied. On the forensic physician's advice, the author was transferred to a hospital. After being injected with serum and undergoing various tests, he was returned to Civil Guard Headquarters. During the day of 16 January, out of fear of reprisals, he signed a statement before a designated lawyer which the Civil Guard officers had themselves dictated. That evening he was brought before the judge, who had just lifted the incommunicado order. He was also examined by a forensic physician appointed by the family. This physician concluded that the allegations of ill-treatment represented coherent testimony.[5] On 17 January 1997, Mr. Arkauz was visited by a delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[6] in Soto del Real prison. On 10 March 1997 he filed a complaint of torture.

The complaint

3.1 In his communication of 16 December 1996 the author stated that his forcible return to Spain and handing over to the Spanish security forces constituted a violation by France of articles 3 and 16 of the Convention against Torture.

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[4] This form of torture consists in covering the head with a plastic bag to cause asphyxia.

[5] A copy of the medical report is attached to the communication.

[6] As of the time of adoption of these Views the CPT report on this visit had not been published.

3.2 The author referred first to article 22, paragraph 5 (b), of the Convention and claimed that the domestic remedies available against warrants of deportation were neither useful nor effective, since they had no suspensive effect and the courts would reach a decision long after the deportation had been carried out. In addition, the procedures were unreasonably prolonged. The admissibility requirement of exhaustion of domestic remedies was therefore said not to be applicable in this case.

3.3 The author submitted that his origin, political affiliation and conviction in France and the threats directed against him, his family and friends provided substantial grounds for fearing that he would be mistreated in custody and that the Spanish police would use every possible means, including torture, to obtain information about ETA activities from him. The danger was all the more real because the author had been portrayed in the press by the Spanish authorities as an ETA leader.

3.4 The handing-over of the author to the Spanish security forces was a "disguised extradition" for the purpose of his incarceration and conviction in Spain. It was an administrative procedure that did not arise from an extradition request made by the Spanish judicial authorities. The five days of police custody and incommunicado detention to which Mr. Arkauz could be subjected under the Spanish law on terrorism would be used to obtain from him the confessions needed for him to be charged. During this period he would not be given the protection of the judicial authorities to which he would have been entitled had he been extradited. The lack of jurisdictional guarantees thus increased the risk of torture.

3.5 In support of his claims, the author mentioned the cases of several Basque prisoners who had allegedly been tortured by the Spanish police between 1986 and 1996 after being expelled from French territory and handed over to the Spanish security forces at the border. In addition, he cited the reports of various international bodies and non-governmental organizations which had expressed their concern at the use of torture and ill-treatment in Spain and at the Spanish legislation enabling persons suspected of belonging to or collaborating with armed groups to be held incommunicado for five days, as well as regarding the impunity apparently enjoyed by the perpetrators of acts of torture. The combination of these various factors (existence of an administrative practice, serious deficiencies in the protection of persons deprived of their liberty and lack of punishment for officials employing torture) provided substantial grounds for believing that the author was in real danger of being subjected to torture. Lastly, he expressed his fears regarding the conditions of detention to which he would be submitted if he was imprisoned in Spain.

3.6 In his communication of 16 December 1996 the author also stated that during his transfer to the border there was a risk that he would be subjected to ill-treatment contrary to article 16 of the Convention, since the police could use force and he would be completely isolated from his family and counsel.

3.7 In his letter of 17 March 1997, the author reiterates that there was a violation by the State party of articles 3 and 16 of the Convention and, subsidiarily, of articles 2 and 22. In seeking to justify his surrender to the Spanish security forces, France is said to have violated article 2 of the Convention. France reportedly sought to justify that action on the basis of necessary solidarity between European States and cooperation against terrorism. However, neither the situation of acute conflict prevailing in the Basque country, nor solidarity between European States, nor the fight against terrorism can justify the practice of torture by the Spanish security forces.

3.8 The author further submits that, by proceeding with his deportation and surrendering him to the Spanish security forces, despite the Committee's request not to expel him, the State party violated article 22 of the Convention because the individual remedy provided for by that article was rendered inoperative. He believes that the State party's attitude under those circumstances amounts to a denial of the binding nature of the Convention.

3.9 The author also criticizes the French authorities for the late notification of the deportation order and its immediate execution, the sole purpose of which, in his view, was to deprive him of any contact with his family and counsel, to prevent him from effectively preparing his defence and to place him at a psychological disadvantage. He submits that it was consequently impossible in practice for him to enter any appeal between the time of notification of the deportation order and its immediate execution.

State party's observations on admissibility

4.1 In a reply dated 31 October 1997, the State party disputes the admissibility of the communication. It indicates that on 13 January 1997, the day on which the deportation order was issued and carried out, it had not known of the Committee's request for a stay of execution, which was received on 14 January 1997, and it therefore could not have taken it into consideration. It adds that the immediate and rapid expulsion was necessary for reasons of public order.

4.2 The State party considers that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. If, in view of the nature of the alleged violation, the Committee were nevertheless to consider that the remedies actually sought before the administrative and judicial courts were not useful since they had no suspensive effect, it should be pointed out that other channels of recourse were open to the author. When notified of the deportation order and the order indicating Spain as the country of return, he could have applied to the administrative court for a stay of execution or for effect to be given to article L. 10 of the Code of Administrative Courts and Administrative Courts of Appeal. The author could also, when notified of the two orders, have complained of a flagrant irregularity ("voie de fait") to the judicial court if he believed that his transfer to Spain had no legal justification and violated a fundamental freedom. According to the State party, such a remedy could have proved effective in view of the rapidity with which the judicial court is required to act and its recognized authority to put an end to a situation which constitutes a flagrant irregularity.

4.3 The State party further specifies that, in order to obtain a rapid decision, the complainant could have applied to the interim relief judge on the basis of article 485 of the new Code of Civil Procedure.[d] It grants that an application for interim relief is admissible only in support of an application in the main action, but argues that such an application could in the present case have been made for damages for the injury suffered as a result of the irregularity. Furthermore, the Prefect who signed the orders of deportation and return to Spain could not have opposed consideration of such an application by the judicial court pursuant to article 136 of the Code of Criminal Procedure.[e]

Comments by the author

5.1 In his comments on the State party's reply, the author recalls the facts and procedures explained in the previous communication and reiterates his observations concerning the admissibility of the communication. With regard to the merits of the case, he recalls his claims concerning the personal threat to him of his being deported to Spain, and the torture and ill-treatment he underwent.

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[d] This article states that "an application for interim relief is made by way of summons to a hearing held on the customary day and at the customary time for such proceedings. If greater speed is required, however, the interim relief judge may allow a summons to be given effect at the time indicated, even on public holidays or non-working days, either in chambers or at his place of residence, in an open hearing."

[e] This article states that "in all cases of infringement of the freedom of the individual, the dispute cannot be taken up by the administrative authority and the judicial courts always have exclusive jurisdiction."

5.2 With reference to the request for a stay of execution of the deportation order made by the Committee on 13 January 1997, the author disputes the claim by the French Government that it had not received the request until 14 January 1997 and therefore did not have time to take it into consideration. In fact, the Government's representative was informed by fax of the request made by the Committee on 13 January 1997, well before the author was notified of the deportation order late in the day on 13 January 1997. The author also says that he was handed over to the Civil Guard by the French police only on 14 January 1997. During the transfer, the French Government could, according to the author, have contacted its officials and deferred deportation.

5.3 The author further argues that even if the French Government had not received the Committee's request until 14 January 1997, it had the obligation, on receiving it, under article 3 of the Convention, to intercede with the Spanish authorities, through diplomatic channels, for example, to ensure that the author was protected against any possible ill-treatment. He specifies that he was tortured continuously up to 16 January 1997, long after the French authorities had received the Committee's request.

5.4 The author also contests the State party's claim that his immediate and rapid deportation was necessary for reasons of public order. Although he was in Fresnes prison, the French authorities chose to have him taken to the Franco-Spanish border, which was the furthest from Paris, yet as a European citizen Mr. Arkauz was entitled to stay and move freely in any part of the European Union, including countries with much less distant borders. According to the author, this is further evidence of the fact that the French authorities deliberately and consciously put him in the hands of the Spanish security forces.

5.5 With regard to domestic remedies, the author first of all submits that the rule of the exhaustion of domestic remedies concerns available, i.e. accessible, remedies. However, he was prevented from having access to the available remedies. The deportation order was carried out immediately by the French police, who allegedly forbade him to warn his wife and counsel. It would thus have been physically impossible for him to communicate with them to inform them that he had been notified of the deportation order and to ask them to file an immediate appeal against his deportation. Furthermore, the French authorities allegedly refused to give them any information on what had happened to him.

5.6 Secondly, Mr. Arkauz argues that, under article 22, paragraph 5 (b), of the Convention, the rule of the exhaustion of domestic remedies does not apply when their application is unreasonably prolonged. He adds that domestic remedies against deportation must have an immediate and suspensive effect. In the present case, however, no judge could have made a ruling within a "reasonable" time, since the decisions in question were enforced immediately the person concerned had been notified of them.

5.7 Thirdly, Mr. Arkauz submits that, under article 22, paragraph 5 (b), the rule of the exhaustion of remedies concerns effective and adequate remedies, and therefore does not apply if the remedies are unlikely to bring relief to the individual concerned. In the present case, neither the administrative remedy nor the judicial remedy proposed by the State party can be considered effective or adequate.

5.8 As regards the administrative remedy, the author points out that, as a preventive measure, he had applied to the Administrative Court of Limoges against his deportation and that the court had reached a decision on that application only after the deportation had been carried out. In response to the State party's argument that he could have reapplied to the administrative court, on being notified of the deportation order and of the order indicating Spain as the country of return, for a stay of execution or for the application of article L.10 of the Code of Administrative Courts and Administrative Courts of Appeal, Mr. Arkauz states that this remedy would have been no more effective than its predecessor.

5.9 As regards the judicial remedy, the author contests the theory of flagrant irregularity put forward by the State party. He states that this theory is applicable in French law only under exceptional circumstances, in particular when the administration has taken a decision which manifestly cannot be related to a power conferred upon it or when it has enforced a decision of its own volition although it manifestly did not have the authority to do so, which is not the case in the present instance. Mr. Arkauz quotes rulings of the Court of Conflicts to the effect that neither a deportation decision, even if illegal, nor a decision to enforce it may be termed flagrant irregularities, and hence only the administrative courts have jurisdiction in such matters.

The Committee's decision on admissibility

6.1 At its twentieth session the Committee considered the question of the admissibility of the communication. It ascertained that the same matter had not been, and was not being, examined under another procedure of international investigation or settlement. Insofar as the exhaustion of domestic remedies is concerned, the Committee noted that no decision regarding the application to the administrative court requesting the suspension of the deportation measure which might have been taken against the author had been reached when the measure was enforced. Furthermore, an appeal against the ministerial deportation order issued in respect of the complainant on 13 January 1997 would not have been effective or even possible, since it would not have had a suspensive effect and the deportation measure was enforced immediately following notification thereof, leaving the person concerned no time to seek a remedy. The Committee therefore found that article 22, paragraph 5 (b), did not preclude it from declaring the communication admissible.

6.2 Accordingly, the Committee decided on 19 May 1998 that the communication was admissible.

Observations by the State party on the Committee's decision declaring the communication admissible

7.1 In a reply dated 4 January 1999 the State party provides information concerning the question of the exhaustion of domestic remedies. It maintains that the author's application to the Administrative Court of Limoges cannot be considered to be relevant, since it does not concern the decision challenged before the Committee. That application, filed on 16 December 1996 in the court registry, was directed not against the deportation measure in dispute, which had not yet been taken, but against a deportation measure that "might" have been taken. That wording alone was sufficient to render the application by Mr. Arkauz inadmissible, as the practice of the administrative courts consistently requires complainants to challenge current and existing decisions. Therefore, the fact that no ruling had been made on the application by 13 January 1997, when the deportation order was issued, does not appear to be decisive in the present case. The judgement was reached two days later, i.e. less than a month after registration of the application. The rendering of this court decision was obviously not a matter of the greatest urgency, since it related not to a current but to a possible measure.

7.2 The author failed to enter an appeal against the ministerial order of 13 January 1997 calling for his deportation from French territory and against the decision specifying Spain as the country of destination. An application for a stay of execution under article L.10 of the Code of Administrative Courts and Administrative Courts of Appeal, a possibility of which the complainant was clearly not unaware, was incontestably the appropriate and available remedy. It was not, however, used. The State party therefore submits that the Committee should declare the communication inadmissible under rule 110, paragraph 6, of its rules of procedure.

7.3 The State party argues that the execution of the deportation measure in question in no way stemmed from a desire on the part of the Government to obviate the right of recourse available to the person

concerned, both at national and international level. More specifically as regards the Committee's recommendation pursuant to rule 108 of its rules of procedure, it was physically impossible for the Government to have known on 13 January 1997, the day on which the deportation order was issued and put into effect, of the request for a stay of execution made by the Committee in its letter of 13 January 1997, that letter having been received the following day at the Permanent Mission of France to the United Nations in Geneva, as attested by the stamp placed on the said document when it arrived. It was therefore impossible for the request to be taken into consideration before the execution of the measure.

7.4 The deportation measure was implemented on 13 January 1997 since on that date the author had paid the sum he owed to the Treasury following his court conviction and there was then no reason, bearing in mind the threat that his presence would represent for public order after his release, to defer a decision to call for and proceed with his deportation. Although the author claims that it was physically impossible for him to enter an appeal, he offers no proof of this, and he certainly does not deny that the notice of the deportation order, which he refused to sign, included information about the procedures and time-limits for an appeal.

Comments by the author

8.1 The author states that when he was notified of the deportation order and of the decision indicating Spain as the country of destination, he was prevented by the authorities from communicating with his wife and counsel. Furthermore, when the latter asked the authorities for news about the author, no information was given to them. Thus, contrary to the State party's contention, it was made impossible for the author, after notification of the deportation order and before its execution, to apply for a remedy, to be brought before a person capable of receiving such an application or to communicate with persons who could have acted in his place.

8.2 The author indicates that the applications made to the administrative court of Limoges were referred, on 27 July 1998, for consideration by the administrative court of Pau, which rendered its judgement on 4 February 1999. The judgement states that while at the time of its submission the request was premature, the issuance of the orders of 13 January 1997 calling for the deportation of Mr. Arkauz and his return to Spain had the effect of regularizing the request. The court also found the handing over of the author to the Spanish security forces to be illegal and therefore annulled that measure. However, an appeal to a French administrative court has no suspensive effect and the administrative court of Pau did not reach a decision on the author's request until two years after the actual implementation of the deportation order. The finding of the author's surrender to be illegal therefore has only a symbolic effect in the circumstances of the present case.

8.3 Concerning the Committee's request for the suspension of the deportation order, the author reiterates the arguments he had put forward in that connection.[1]

State party's observations on the merits

9.1 The State party notes that, on his arrival in France, the author was given temporary permits to stay as an asylum seeker but the French Office for the Protection of Refugees and Stateless Persons (OFPRA) and the Refugee Appeals Board rejected his asylum request in 1981. Thereafter, he neither reapplied for refugee status, as he could have done, nor looked for another country prepared to accept him, although his situation was irregular and he knew that he might be subject to an enforceable measure of banishment. In 1992 he was sentenced to eight years' imprisonment, a ten-year prohibition on residence and a

[1] See paras. 5.2 and 5.3.

three-year ban from French territory for conspiring with others to commit one or more offences, as well as for illegally bearing weapons, keeping explosives and munitions and using false administrative documents. That conviction automatically gave rise to the possibility of deportation.

9.2 The State party indicates that the real risks mentioned by the author were evaluated by the national authorities prior to implementation of the deportation procedure, according to the criteria defined in article 3, paragraph 2, of the Convention.

9.3 Two main points led the administration to believe that there was nothing to prevent implementation of the deportation measure. Firstly, the specialized bodies responsible for determining eligibility for political refugee status had rejected the author's application in 1981, feeling that the fears of persecution alleged by him were unfounded. Secondly, in view of the commitments made by Spain regarding the protection of fundamental freedoms, the French Government, although certainly not unaware that the person concerned might be subject to criminal prosecution in that country, could legitimately feel that there were no substantial grounds for believing that the author was in danger of being tortured. The legitimacy of that position was confirmed by the European Commission of Human Rights, which, in its inadmissibility decisions of 1998 in two cases where the points of fact and law were perfectly comparable, considered that the French Government had no substantial grounds for believing that the complainants would be subjected to torture in Spain. The Commission noted that there was a presumption favourable to that country concerning respect for human rights, in particular on account of its accession to the European Convention, the International Covenant on Civil and Political Rights and the Optional Protocol thereto. It also made reference to the report of the European Committee for the Prevention of Torture, which stated that torture could not be regarded as common practice in Spain.

9.4 The State party also indicates that, before being taken to the border, Mr. Arkauz underwent a medical examination, which concluded that he was in a fit state to be deported, and that after his arrest and detention by the Spanish authorities he was again seen by a doctor. Furthermore, the procedure initiated in Spain was conducted in accordance with the instructions of the examining magistrate who had issued international arrest warrants and authorized the transfer of Mr. Arkauz to Civil Guard Headquarters in Madrid, so that he could be heard in the presence of a lawyer.

9.5 If the author had indeed been the victim of acts contrary to article 3 of the Convention, a supposition which might be verified by the proceedings under way in Spain, those acts could only be regarded as having been committed by isolated individuals in breach of the guidelines laid down by the Spanish State. As such, they could not have been foreseen and the French Government cannot be blamed for having neither suspected nor prevented such an outcome.

9.6 For all the above reasons, no failure to comply with the provisions of article 3 of the Convention could be deemed to have been established.

9.7 As to the claim of a violation of article 16 of the Convention, the State party submits that the author cannot effectively invoke the provisions set forth in that article, which are inapplicable because the territory in which the violations of article 3 of the Convention were allegedly committed is not under the jurisdiction of the French State.

Comments by the author

10.1 The author reiterates that there were substantial grounds for believing that he would be in personal danger of being subjected to torture if he was deported to Spain. The existence of such a danger was confirmed by the following facts: the author and his family had been the targets of threats and harassment;

the Anti-Terrorist Liberation Groups (GAL) were preparing an attempt on his life; and he had been handed over by the French police to Civil Guard personnel from the anti-terrorist sections of the Intxaurrondo barracks, which had been publicly accused, *inter alia*, of committing acts of torture. Furthermore, during his interrogation in January 1997 the Civil Guard personnel confirmed to him that they had prepared an assassination attempt against him while he was living in Bayonne; and he had been portrayed by the Spanish authorities as an important figure in ETA.

10.2 The author again states that the length and conditions of the police custody are conducive to the practice of torture and other forms of ill-treatment by the Spanish security forces and that the machinery for supervision and forensic medical assistance for detainees are seriously inadequate. Inquiries into the circumstances of torture are very difficult and when, on occasion, they are completed, the procedures are very long.

10.3 The State party maintains that the author should have asked for political refugee status on the grounds of the risks to his life and liberty in the event of his return to Spain. However, for political reasons, the French Government no longer grants such status to Basques applying for it. Furthermore, the protection arising under article 3 of the Convention concerns "everyone" and not just persons applying for or having the status of refugee.

10.4 According to the author, the State party is making an erroneous interpretation of the findings of the European Committee for the Prevention of Torture (CPT). The latter actually stated that "it would be premature to conclude that the phenomenon of torture and severe ill-treatment had been eradicated" in Spain.[8]

10.5 The fact that Spain is a party to the Convention and has recognized the competence of the Committee under article 22 does not, in the present case, constitute a sufficient guarantee of the author's safety.

10.6 Insofar as the violation of article 16 of the Convention is concerned, the State party has not denied that the author was subjected to ill-treatment during his transfer to the border post. Those acts should have been the subject of a prompt and impartial investigation by the competent authorities, in accordance with article 12 of the Convention. However, no such investigation was held. The State party does not dispute the fact that the author was illegally handed over to the Spanish security forces while in a state of extreme weakness, after 35 days of a hunger strike and five days of refusing to take liquids. The fact of handing over a person under such circumstances for prolonged interrogation in itself constitutes cruel, inhuman and degrading treatment. In addition, at the time of the deportation, the medical file of the person concerned was transmitted by the French police to the Spanish Civil Guard officers. Moreover, the medical details contained in this file, and in particular the fact that the author was suffering from degenerative discopathy, were used during the police custody to aggravate the author's suffering, notably by forcing him to adopt postures designed to increase his back pain. The fact of having supplied the medical file also constitutes cruel, inhuman and degrading treatment.

Issues and proceedings before the Committee

11.1 In accordance with rule 110, paragraph 6, of its rules of procedure, the Committee reconsidered the question of admissibility in the light of the observations made by the State party concerning the Committee's decision declaring the communication admissible. The Committee notes, however, that the

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[8] Reports to the Spanish Government on the visits which took place from 1 to 12 April 1991, 10 to 22 April 1994 and 10 to 14 June 1994, CPT/Inf (96) 9, paras. 25 and 206.

application made by the author to the Administrative Court of Limoges was relevant even if, at the time of its submission, the deportation measure had not yet been taken. This was confirmed by the judgement of the Administrative Court of Pau, which stated that the issuance of the orders of 13 January 1997 calling for the deportation of Mr. Arkauz and his return to Spain had the effect of regularizing the author's application. The Committee accordingly found no reason to revoke its decision.

11.2 The Committee notes the author's allegations that he was ill-treated by the French police officers while being driven to the Spanish border. The Committee considers, however, that the author has not exhausted the domestic remedies available in this respect. It therefore declares that this part of the communication is not admissible.

11.3 With regard to the substance of the communication, the Committee must determine whether the author's deportation to Spain violated the obligation of the State party, under article 3, paragraph 1, of the Convention, not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In doing so the Committee must take into account all relevant considerations with a view to determining whether the person concerned is in personal danger.

11.4 The Committee recalls that during the consideration of the third periodic report submitted by Spain under article 19 of the Convention, it had expressed its concern regarding the complaints of acts of torture and ill-treatment which it frequently received. It also noted that, notwithstanding the legal guarantees as to the conditions under which it could be imposed, there were cases of prolonged detention incommunicado, when the detainee could not receive the assistance of a lawyer of his choice, which seemed to facilitate the practice of torture. Most of the complaints received concerned torture inflicted during such periods.[h] Similar concerns had already been expressed during the consideration of the second periodic report by the Committee,[i] as well as in the concluding observations of the Human Rights Committee regarding the fourth periodic report submitted by Spain under article 40 of the International Covenant on Civil and Political Rights.[j] Furthermore, the European Committee for the Prevention of Torture (CPT) also reported complaints of torture or ill-treatment received during its visits to Spain in 1991 and 1994, in particular from persons detained for terrorist activities. The CPT concluded that it would be premature to affirm that torture and severe ill-treatment had been eradicated in Spain.[k]

11.5 The Committee notes the specific circumstances under which the author's deportation took place. First, the author had been convicted in France for his links with ETA, had been sought by the Spanish police and had been suspected, according to the press, of holding an important position within that organization. There had also been suspicions, expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their incommunicado detention. The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police,[l] without the intervention of a judicial authority and without any

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[h] A/53/44, paras. 129 and 131.

[i] A/48/44, paras. 456 and 457.

[j] CCPR/C/79/Add.61 of 3 April 1996.

[k] CPT/Inf (96) 9, paras. 208-209.

[l] At the time of the consideration of the second periodic report submitted by France pursuant to article 19 of the Convention, the Committee expressed its concern at the practice whereby the police hand over individuals to their counterparts in another country (A/53/44, para. 143).

possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.

12. In the light of the foregoing, the Committee is of the view that the author's expulsion to Spain, in the circumstances in which it took place, constitutes a violation by the State party of article 3 of the Convention.

13. Pursuant to rule 111, paragraph 5, of its rules of procedure, the Committee would wish to receive, within 90 days, information on any measure taken by the State party in accordance with these views.

[Done in English, French, Russian and Spanish, the French text being the original version.]

3. Communication No. 96/1997

Submitted by:	A.D. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	7 November 1997

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 12 November 1999,

Having concluded its consideration of communication No. 96/1997, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 22, paragraph 7, of the Convention.

1.1 The author of the communication is A.D., a Sri Lankan national of Sinhalese origin at present residing in the Netherlands, where he has asked for asylum. His asylum request has been rejected and he is at risk of deportation. He claims that his return to Sri Lanka would violate the Netherlands' obligations under article 3 of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 19 November 1997.

The facts as presented by the author

2.1 The author states that since 1974 he has worked as a freelance photographer in Sri Lanka and that in 1990 he began to take pictures of people murdered or injured. The first pictures he took were of six people who had been burned and were lying on the side of a road between Minuwangoda and Jaela, tied to tyres. The author suspected that the victims were supporters of the Sinhalese nationalist People's Liberation Front (JVP). At first he took these pictures for himself out of indignation, but later he decided to make them public. The pictures were published in two newspapers ("*Lakdiwa*" and "*Rajatiya*"), in weekly magazines ("*Ira*", "*Hannde*" and "*Janahita*") and in a monthly review ("*Kolama*"). The author's name was not published at that time. In 1991, some of the author's signed pictures were exhibited at the National Photographic Art Society. Apparently, unknown persons made inquiries about the identity of the photographer.

2.2 On or around 8 October 1992, the author was visited in his studio by eight men who were dressed in black and wearing masks. They asked him whether he worked for newspapers and, although the author denied this, they destroyed his equipment. They also forced him to shut his studio and go home.

2.3 A few days later, two unknown persons abducted the author from his home in Colombo, blindfolded him and drove him to a two-storey building where he was held with about 10 other persons in a room. The author believes that the other persons were members or supporters of the JVP. The author states that he was subjected to torture, including beatings, having needles placed under his fingernails, being dropped from a height of about three metres, having an iron rod inserted into his rectum, having a bag of chili peppers tied over his head, hanging upside down by the legs for three hours and fake executions by hanging.

2.4 After 15 days he was released. He was driven blindfolded to the Rajagiriya graveyard and left there. He then walked to his home in Madjadah, Colombo. His neighbour took him to Kandy, near Barigama, after which he did not return to Colombo. He worked in Kandy, mostly in his studio, and appeared in public as little as possible.

2.5 The author arrived in the Netherlands in May 1993. On 23 September 1993 he filed a request for asylum or to be granted a residence permit on humanitarian grounds. In addition to the events recounted above, the author also brought to the attention of the asylum authorities that he had attended a meeting organized by the "*Fédération internationale de l'art photographique*" in the Netherlands where he made a speech criticizing the Sri Lankan regime.

2.6 On 19 October 1993, his request was denied by the State Secretary of Justice on the grounds that the author had not undertaken any political activities and was not considered a refugee according to the 1951 Convention relating to the Status of Refugees. The State Secretary further emphasized that the author had stayed in the Netherlands for four months before requesting asylum and that he had travelled on a passport in his own name. Finally, the State Secretary noted that the opinions expressed in the Netherlands by the author about the Government of Sri Lanka did not constitute grounds for granting him refugee status. On 22 October 1993, the author applied for a review of the decision, but the State Secretary denied suspensive effect to his application.

2.7 The author then initiated summary proceedings before the District Court in The Hague in order to obtain from its President a decision that he should not be deported pending the completion of the review

procedure. This application was rejected on 14 December 1993 and on 29 July 1994, the State Secretary of Justice rejected the author's application for review.

2.8 On 10 August 1994, the author appealed the decision of the State Secretary to the District Court in The Hague, which rejected the appeal on 14 July 1995. Finally, on 5 December 1995, the Netherlands section of Amnesty International intervened on behalf of the author, but the State Secretary replied on 16 May 1997 that she would not revoke her decision, *inter alia*, owing to the change which had taken place in the political situation in Sri Lanka since 1992.

2.9 The author states that he still suffers from health problems as a consequence of the torture to which he was subjected. He refers to a medical report, dated 11 December 1995, according to which he had problems with his shoulder, back and left leg, and these conditions were not incompatible with the torture as described. In a further medical report of 23 October 1997 by Amnesty International's medical research team, it is stated that the physical examination showed several physical signs that fit the types of torture described by the author, such as insertion of needles under fingernails. The report further stated that although the author was not suffering from post-traumatic stress syndrome at the time, the anamnesis suggested that he had probably suffered from it in the past and was able to develop effective strategies to cope. According to the report, many indicators of post-traumatic stress were apparent, such as avoidance behaviour, partial amnesia and sleep disorders.

2.10 According to the author, the human rights situation in Sri Lanka in 1992 was alarming. Photographers and journalists were particularly targeted. He refers to press reports according to which in the early 1990s death squads known as "black cats" were operating with the support of the Government. Many human rights activists disappeared. After the 1994 elections the United National Party (UNP) lost power and was replaced in government by the People's Alliance (PA). However, journalists continued to be intimidated and disappearances and executions continued. Prosecution and punishment for past human rights violations are said to be inadequate and the Government is said to fail to control the police and the military.

The complaint

3. The author argues that he would be in danger of being tortured if he were to return to Sri Lanka. He states that there is a consistent pattern of gross, flagrant and mass human rights violations in that country and fears that those responsible for the killings photographed by him may seek revenge. He says that it cannot be required of someone who was a victim of serious human rights violations in the past that he return to the country where those violations occurred.

State party's observations on admissibility and merits

4.1 In a submission of 19 January 1998, the State party informed the Committee that in its view, the author had exhausted available domestic remedies and that it accepted the admissibility of the communication. In submissions of 19 May 1998, 28 May 1998 and 19 June 1998, the State party presented its observations regarding the merits of the communication.

4.2 The State party points out that in the course of the domestic proceedings, a careful assessment had been made of the general human rights situation in Sri Lanka and the feasibility of return to Sri Lanka. According to the State party's available information, the so-called "Black Cats death squads" were active in the years 1988 to 1990, when the United National Party was in power. After the People's Alliance came into power in 1994, the human rights situation in Sri Lanka improved and all previous restrictions on the freedom of the press were withdrawn. In September 1995, when the armed conflict between the

Government and the Liberation Tigers of Tamil Eelam erupted again in the north, censorship was introduced on reporting about military operations in that area. Although the state of emergency and the censorship of reports of military operations in the north places constraints on journalists, the State party states that it has no information about journalists being harassed in connection with war reporting.

4.3 In view of the author's statements and documentary evidence, the State party does not doubt that the author is a photographer and that he took photographs from 1990 onwards, whether or not instructed to do so by various political parties, of victims of human rights violations and that these photographs were published in various newspapers. The State party also considers it plausible that the author was in fact abducted because of these activities.

4.4 The State party wishes to draw the attention of the Committee to the discrepancies between the arguments and statements on which the communication is based and the statements made by the author in the initial domestic proceedings. In the domestic proceedings the author consistently stated that he had been abducted in March 1991 and held captive for 15 days. It was not until after the domestic proceedings had been concluded that the author stated, through Amnesty International, that the abduction and alleged torture had taken place not in March 1991 but on 8 October 1992. The author has not explained this inconsistency, although it is important for an assessment of his account. Had he been abducted in 1991, it would be curious that it was not until 8 October 1992 that men approached him and urged him to close his studio. In any event, the author has not supplied any information about the period between March 1991 and 8 October 1992. His explanation for this, namely that he had been unable to communicate adequately due to the absence of a Sinhalese interpreter, is not credible. The author's national case file makes it clear that his command of English is sufficient for him to have been able to supplement his story accordingly.

4.5 Furthermore, when the author lost his appeal he also changed the statement he had made during the domestic proceedings that he did not decide to leave Sri Lanka until May 1993. He apparently stated to Amnesty International that he had already decided to leave his country after his alleged abduction on 8 October 1992. He has not supplied an adequate explanation for this inconsistency either. In the State party's opinion, the author probably changed his story to make it more logically consistent.

4.6 In addition, the State party points out that from the moment of his release in October 1992 until the date of his departure in May 1993, the author was able to avoid any further problems by moving to a different part of the country. The State party submits that it does not have enough information to ascertain whether the author was obliged to do this work in secret, as he maintains. Finally, the State party argues that the author's photographic activity related to exposing the misdeeds of the previous United National Party regime, which would not put him at risk of persecution by the present Government.

4.7 As to the assessment of the medical evidence supplied by the author, the State party notes that the medical certificate of 11 December 1995 stated that the violence described by the author **might** have caused the pain in his shoulders and back from which he was suffering. The State party also refers to the medical examination conducted by the medical research team of Amnesty International after the domestic proceedings had been formally concluded, noting that while the physical examination revealed a variety of abnormalities consistent with the type of torture the author had described, the author did not satisfy the criteria for a diagnosis of post-traumatic stress syndrome, and although he might have suffered from this syndrome in the past he had managed to develop effective ways of coping with it.

4.8 Lastly, the State party argues that several of the individual factors that the Committee has deemed to be of decisive importance in other communications it has dealt with play little or no role in the present one, such as the ethnic origin or political activities of the individual concerned. In the present case the

author did not have any problems relating to his Sinhalese origin, nor did he sympathize with or work actively for any political party.

4.9 The State party concludes that the author has not substantiated elements which would allow it to be concluded that, on the basis of his ethnic background, alleged political affiliation and history of detention, the author would be in danger of being subjected to torture upon his return to Sri Lanka. Accordingly, it considers the communication ill-founded.

Counsel's comments

5.1 In his reply to the State party's submission, counsel notes that the State party does not contest the most important elements of the author's account of his activities as a photographer, i.e. abduction and escape from Sri Lanka. The inconsistencies to which the State party refers do not raise doubts as to the general veracity of his claim and are to be explained by the absence of a Sinhalese interpreter during the initial asylum proceedings and the fact that the author had previously been subjected to torture and serious ill-treatment.

5.2 Counsel further notes the State party's argument that the author's activities in Sri Lanka were not based on political conviction and that he was never a member of a political party. According to counsel, the position of the State party displays an incorrect and narrow definition of "political belief". Even though the author was not member of a political party, political belief was attributed to him by the authorities owing to his having published photographs of victims of human rights violations. According to both Netherlands case law and international refugee law, attributed political belief has been considered as one criterion for determining refugee status.

5.3 Counsel refutes the argument that by moving to another part of Sri Lanka the author was able to avoid any further difficulties from October 1992 until his departure. Counsel maintains that the author went into hiding and worked in secret and points out that the State party itself admits not having enough data to ascertain whether the author was actually obliged to work in secret. The question of an internal flight alternative was not previously raised during the domestic proceedings and should therefore not be an issue before the Committee. In any case, an internal flight alternative would not be feasible, in view of the fact that the author was being persecuted by the authorities.

5.4 With respect to the medical evidence, counsel submits that the State party should have conducted its own medical examination in view of the author's claim that he had been subjected to torture. A medical examination, conducted by the Bureau of Medical Advice of the Ministry of Justice, could have demonstrated that the torture to which the author was subjected in Sri Lanka had resulted in a post-traumatic stress disorder.

5.5 With reference to the general political situation in Sri Lanka, counsel draws the attention of the Committee to the fact that in view of the uncertain and dangerous situation prevailing in the country, the Netherlands authorities have for a period of time refrained from deporting Sri Lankan asylum-seekers. In the present situation there is no guarantee that the author would not risk persecution by the Government now in power in Sri Lanka, nor that he would be effectively protected by the Government should he be persecuted or tortured by those previously in power.

Additional observations by the State party and counsel

6.1 On 14 December 1998, the State party provided the Committee with additional observations in response to counsel's comments. It pointed out that counsel's comments regarding the non-deportation from the Netherlands of Sri Lankan asylum-seekers was incorrect. In spring 1998 the State Secretary for Justice of the Netherlands considered it unnecessary to change the policy on expelling asylum-seekers in connection with the situation in Sri Lanka. On 23 June 1998, the State Secretary for Justice informed the Lower House of Parliament that rejected Tamil asylum-seekers would not be expelled from the Netherlands, pending a court judgement on an appeal brought by a Tamil and in the light of the injunction granted in that case. The decision not to expel this category of person during a certain period of time was thus a procedural matter. In a judgement of 9 October 1998, the Hague District Court considered that the State Secretary for Justice could in all reasonableness have concluded that expelling rejected Tamil asylum-seekers to Sri Lanka could not be construed as a particularly harsh measure. The present policy of returning Sri Lankan asylum-seekers is therefore still in place.

6.2 The State party further informed the Committee that, on 17 November 1998, the State Secretary for Justice had informed counsel that the author might be eligible for a residence permit for medical treatment. According to the State party's information, the author had applied for such a permit, which was likely to be granted within a foreseeable period. The State party submitted that once the author had received a residence permit for medical treatment, he would no longer be at risk of expulsion and the grounds for his application to the Committee would cease to exist.

6.3 On 22 April 1999, counsel informed the Committee that the author had not yet received any residence permit for medical treatment. Furthermore, such a permit would be temporary and expire when the medical treatment was no longer necessary in the view of the medical adviser to the Ministry of Justice. Counsel submits that such a permit only postpones the expulsion risk, and that this is inadequate in order to fulfil the requirements of article 3 of the Convention.

6.4 By submission of 28 October 1999, the State party informed the Committee that, on 7 June 1999, the State Secretary of Justice had granted the author a residence permit for medical treatment, valid from 9 December 1998 until 30 September 1999.[a] Furthermore, the author had requested an extension of this permit. There was no risk of expulsion while his request was under consideration.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee further notes the State party's view that the author has exhausted domestic remedies and that it accepts the admissibility of the communication. The Committee finds that no further obstacles to the admissibility of the communication exist. Since both the State party and the author's counsel have provided observations on the merits of the communication, the Committee proceeds with the consideration of such merits.

7.2 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Sri Lanka. In reaching this decision, the Committee must take into account all relevant

[a] Counsel confirmed that information.

considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

7.3 The Committee notes the State party's information that the author at present does not risk expulsion, pending the consideration of the author's request for extension of his residence permit for medical treatment. Noting that the order for the author's expulsion is still in force, the Committee considers that the possibility that the State party will grant the author an extended temporary permit for medical treatment is not sufficient to fulfil the State party's obligations under article 3 of the Convention.

7.4 The Committee considers that the author's activities in Sri Lanka and his history of detention and torture are relevant when determining whether he would be in danger of being subjected to torture upon his return. The Committee notes in that respect that although the State party has pointed to inconsistencies in the author's account of events, it has not contested the general veracity of his claim. The Committee further notes the medical evidence indicating that the author, although not at present fulfilling the criteria for diagnosis of a post-traumatic stress disorder, may have suffered from this syndrome in the past. However, the Committee also notes that the harassment and torture to which the author was allegedly subjected were directly linked to his exposure of human rights violations taking place while the previous Government was in power in Sri Lanka. The Committee is aware of the human rights situation in Sri Lanka but considers that, given the shift in political authority and the present circumstances, the author has not substantiated his claim that he will personally be at risk of being subjected to torture if returned to Sri Lanka at present.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the decision of the State party to return the author to Sri Lanka would not constitute a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the English text being the original version.]

4. Communication No. 99/1997

Submitted by:	T.P.S. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Canada
Date of communication:	19 September 1997

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 16 May 2000,

Having concluded its consideration of communication No. 99/1997, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 22, paragraph 7, of the Convention.

1. The author of the communication is Mr. T.P.S., an Indian citizen born in 1952 who was seeking asylum in Canada at the time the communication was registered. He claimed that his forcible return to India would constitute a violation by Canada of article 3 of the Convention against Torture. He is represented by counsel.

Facts as presented by the author

2.1 In January 1986, the author and four co-accused were convicted by a Pakistani court of hijacking an Indian Airlines aeroplane in September 1981 and sentenced to life imprisonment. Counsel explains that no violence was used during the hijacking and that the plane, which was on its way from New Delhi to Amritsar, landed safely in Lahore, where it was diverted. There were no reports that any passenger had been mistreated. The purpose of the hijacking was to draw attention to the general maltreatment of Sikhs by the Government of India. The author states that he was arrested within hours of the plane landing and forced to sign a confession at gunpoint. He also states that he was held in pre-trial detention for four years without access to counsel. It is not clear whether he claims to be innocent, but he argues that his trial was unfair and the ensuing conviction unlawful.

2.2 In October 1994, the Government of Pakistan released the author and his co-accused on the condition that they leave the country. The author states that he could not return to India for fear of persecution. With the assistance of an agent and using a false name and passport, he arrived in Canada in May 1995. Upon arrival he applied for refugee status under his false name and did not reveal his true identity and history. In September 1995, the author was arrested and kept in detention by the immigration authorities. He was later released on the condition that he reports once a week to a Vancouver immigration office.

2.3 At the end of 1995, an immigration inquiry was opened to determine whether the author had committed an offence outside Canada which, if committed in Canada, would constitute an offence punishable by a maximum prison term of 10 years or more. His refugee application was suspended. In the beginning of 1996, an adjudicator decided that the author had committed such an offence and, as a result, a conditional deportation order was issued against him. At the same time the Canadian Minister of Immigration was requested to render an opinion as to whether the author constituted a danger to the Canadian public. Such a finding by the Minister would prevent the author from having his refugee claim heard and would remove his avenues of appeal under the Immigration Act.

2.4 The author successfully appealed the adjudicator's decision and a new inquiry was ordered by the Federal Court of Canada. As a result of the second inquiry the author was again issued with a conditional deportation order. No appeal against the decision was filed, for lack of funds. The Minister was again requested to render an opinion as to whether the author constituted a danger to the public. The Minister issued a certificate so stating and the author was detained with a view to his removal.

The complaint

3. The author states that the use of torture against suspected Sikh militants in India is well documented. He provides the Committee with articles and reports in that respect. He claims that he has serious grounds to believe that he will be subjected to torture upon return to India. Moreover, there is evidence that the Governments of India and Pakistan have been actively cooperating with Canadian enforcement officials to have the author expelled. Given that he has already served his sentence, rightfully or wrongfully, and that he faces no charges for which he could be extradited, he believes that the Government of India's interest in having him returned is for purely extrajudicial reasons.

State party's observations on admissibility

4.1 On 18 December 1997 the Committee, acting through its Special Rapporteur for new communications, transmitted the communication to the State party for comments and requested the State party not to expel or deport the author to India while his communication was under consideration by the Committee. On 29 December 1997 the State party informed the Committee that the author had been removed from Canada to India on 23 December 1997. In reaching that decision the authorities had concluded that there were no substantial grounds for believing that the author would be in danger of being subjected to torture in India.

4.2 In a further submission dated 11 May 1998 the State party refers to the inquiries undertaken by the Canadian authorities. The author's refugee application was referred by a senior immigration officer to the Convention Refugee Determination Division of the Canadian Immigration and Refugee Board on 26 May 1995. During his first interview with immigration officers the author used a false name and stated that he had never committed nor been convicted of a crime or offence. He based his refugee claim on religious persecution and cited one incident of mistreatment by the Indian police.

4.3 Subsequently, the Department of Citizenship and Immigration Canada (CIC) discovered his true identity and a report was issued stating that the author was suspected of belonging to a category considered inadmissible under the Immigration Act because he had engaged in acts of terrorism. On 21 September 1995 he was arrested. When interviewed by a CIC immigration investigator and two officers of the Canadian Security Intelligence Service, he acknowledged that he was an active member of the Dal Khalsa terrorist group and had participated in the hijacking of the Indian Airlines flight. The State party also mentions that in an article dated 19 October 1994 published in the Pakistani press the author had pledged to continue the struggle for Khalistan.

4.4 In November 1995 another report was issued stating that the author belonged to another inadmissible category, namely persons who there are reasonable grounds to believe had been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence punishable by a term of at least 10 years' imprisonment. As a result of the two reports an adjudicator conducted an inquiry and concluded that the author had in fact been convicted of an offence that, if committed in Canada, would be punishable by a term of at least 10 years' imprisonment.

4.5 The author applied for leave for judicial review of this decision. The Government of Canada consented to his application after it was determined that the adjudicator had erred in the process of determining that the author was inadmissible. The Federal Court Trial Division ordered that a new inquiry be held. The adjudicator in charge of the second inquiry found, in a decision dated 30 May 1997, that the author was known for criminality and terrorism. As a result, a conditional deportation order was issued. The author did not seek leave for judicial review of this decision.

4.6 By letter dated 5 June 1997 the author was informed that CIC intended to request an opinion from the Minister of Citizenship and Immigration to the effect that it would be contrary to the public interest to have his refugee claim heard. The author was also apprised that as part of this procedure the Minister would consider any humanitarian and compassionate circumstances pertinent to his situation, including any possibility that he would be at risk should he be removed to India. The author was required to present submissions to the Minister, which he did.

4.7 On 3 December 1997 CIC addressed a memorandum, to which the author's submissions were attached, to the Minister, evaluating the risk of returning him to India in the light of the documentary evidence of the human rights situation in India and the personal circumstances of the author. It was concluded that the author might face a minimal risk upon return to India, but that this minimal risk needed to be weighed against the impact of Canada providing refuge to an individual who had been convicted of hijacking, a terrorist act. On 8 December 1997 the Minister rendered her opinion that it would be contrary to the public interest to have the author's refugee claim heard.

4.8 On 18 December 1997 the author applied for leave for judicial review of the Minister's decision. He also applied for an interim order staying the execution of the deportation order. On the same day the Government of Canada became aware, through a conversation with the author's counsel, that the author had filed a communication in September 1997 with the Committee and that the Committee had requested on 18 December 1997 that the author not be expelled pending its consideration of the communication. The Committee's letter informing the State party of the author's communication and the request for interim measures was received on 19 December 1997.

4.9 On 22 December 1997 the Federal Court Trial Division dismissed the author's application regarding the deportation order. The Court emphasized that the author would be excluded from Convention refugee status owing to his past terrorist activities and that Canada should not be nor be seen to be a haven for terrorists. It noted that the author had had ample opportunity to suggest another country of removal than India, that India did not have a policy of or encourage police brutality, and that the author's high profile would provide him with protection against any possible ill-treatment by the Indian authorities.

4.10 On 23 December 1997 the Court issued a supplementary decision with respect to the author's request that the Court certify whether a person's rights under the Canadian Charter of Rights and Freedoms are infringed in the case of removal to a country where there is a reasonable possibility that the individual would be subjected to torture, pursuant to an opinion by the Minister that it would be contrary to the public interest to have the individual's refugee claim heard. The Court determined that the author's question should not be certified. In rendering its decision the Court found that the author had not shown that it would be demonstrably probable that he would face torture upon return to India.

4.11 On 23 December 1997 the author was removed from Canada. He was escorted to New Delhi by one CIC officer and one police officer. Upon arrival the author was dealt with in a normal fashion and was not treated by the Indian police any differently from other individuals removed to India.

4.12 On 9 March 1998 the author's application for leave for judicial review of the Minister's opinion concerning his refugee claim was dismissed by the Federal Court Trial Division for failure of the author to file an application record within the prescribed period.

4.13 The State party argues that the communication before the Committee is inadmissible for failure to exhaust domestic remedies. First of all, the author did not seek leave for judicial review of the 30 May 1997 decision of the adjudicator that he was inadmissible on the basis of terrorism and criminality under the Immigration Act. If leave had been sought and granted, that decision would have been reviewed by the Federal Court Trial Division. A successful review application would have resulted in an order that a new inquiry be held and a decision rendered consistent with the reasons of the Court. If it was determined that the petitioner did not fall within an inadmissible category, there would be no basis for excluding him from the refugee determination process and he would not have been removed from Canada pending consideration of his refugee claim. Moreover, the author could have sought an extension of the time required for the filing of the application for leave for judicial review. Such extensions are frequently granted and would have allowed the author to file a late application.

4.14 The author alleges that he did not appeal or seek judicial review for lack of funds. In fact, there is no charge for submitting an application for leave for judicial review and it is a comparatively inexpensive procedure. The author clearly found the financial means to retain counsel – or his counsel had acted *pro bono* – with respect to several previous and subsequent proceedings, including proceedings before the Committee. The author has not provided any evidence that he had sought legal aid or that legal aid had been denied.

4.15 Secondly, the author did apply for leave for judicial review with respect to the Minister's opinion that it would be contrary to the public interest to allow the author's refugee claim to be heard. However, the author failed to perfect this application by filing an application record within the prescribed period. As a result, the author's application was dismissed. If the author had filed an application record and leave had been granted, the Minister's opinion would have been scrutinized by the Federal Court Trial Division. If the application had been successful the Court would have returned the matter to the Minister for a decision in accordance with the reasons of the Court.

Counsel's comments

5.1 In a submission of 20 January 1998 counsel claimed that the State party, in its response of 29 December 1997, failed to indicate how the Canadian authorities arrived at their conclusion regarding the risk facing the author. The author was never afforded an opportunity to have his refugee claim heard, nor was he ever afforded the benefit of an oral hearing before an independent tribunal where he could give his personal testimony concerning his fears. The only opportunity that the author had to provide documentation regarding the risk he faced was when the Minister of Immigration was requested to render an opinion as to whether it would be contrary to the public interest to allow the author to proceed with his refugee claim. Once that documentation had been provided, the entire decision-making process was conducted by the immigration officials. Counsel was not even advised of what other materials the authorities would be considering; consequently, he never had an opportunity to comment upon or respond to all materials that might have been before the Minister.

5.2 Counsel refers to the memorandum to the Minister which she purportedly relied upon in rendering her decision that it would be contrary to the public interest to allow the author to proceed with his refugee claim. According to counsel, the memorandum was evidence that there was absolutely no analysis of the particular risk facing the author in India given his past and current profile. It mainly focused on the author's past history and Canada's international obligations regarding the treatment of so-called terrorists;

however, there was little reference to Canada's numerous international obligations under human rights treaties, including the 1951 Convention relating to the Status of Refugees.

5.3 Counsel also provided an affidavit by the author's niece, who was in India when the author arrived from Canada. She states that upon his arrival, the author was subjected to interrogation for about six hours and that he was verbally threatened by officers from the Central Bureau of Investigation. She expressed concern that he would eventually be subjected to torture or extrajudicial execution. Further information submitted to the Committee by the niece indicates that the intimidation of the author and his family by the police has continued and that the author has informed the Human Rights Commission of Punjab about it.

5.4 With respect to the admissibility of the communication, counsel argues, in a submission of 11 June 1998, that at the time the decision of the adjudicator was rendered, it was not absolutely necessary for the author to seek leave for judicial review in order for him to be able to proceed with a refugee claim. The cost of the legal proceedings was only one factor which guided the author's decision not to seek review. His main interest was to avoid any further delays in proceeding with his refugee claim. He had been in Canada for almost two years and was anxious to present his refugee claim to the Canadian authorities. He did not wish to delay this process by launching another judicial review. Secondly, there was little likelihood of success at any judicial review.

5.5 The State party stated that if it had determined that the petitioner did not fall within an inadmissible category, there would be no basis for excluding him from the refugee determination process and he would not have been removed pending consideration of his refugee claim. This statement is extremely misleading. In fact, the finding of the adjudicator resulted in the issuance of a conditional deportation order. This result does not necessarily mean that an individual will not be afforded the opportunity to proceed with his refugee claim, it provides that the deportation is conditional upon the outcome of the refugee claim.

5.6 Although it is acknowledged that the adjudicator's finding does provide the immigration authorities with an avenue to seek the Minister's opinion with respect to whether the refugee process should remain open to such a person, there is no guarantee that such an avenue will be pursued. There was no obligation on the part of the Canadian immigration authorities, or even the Minister, to prevent the author from proceeding with his refugee claim. The author's access to the refugee process was halted for political, not judicial or quasi-judicial, reasons. His refugee claim could have proceeded in spite of the adjudicator's finding.

5.7 The State party seems to be arguing that due diligence requires that a person ought to protect himself from every eventuality that might occur. Counsel argues that this is not the standard required by article 22, paragraph 5, of the Convention. A person who is anxious to proceed with telling his life story to the authorities in order to secure their protection should not be blamed for not wishing to extend his agony by undertaking yet another judicial review when the refugee process remains open to him.

5.8 Regarding the author's failure to perfect an application for leave for judicial review of the Minister's opinion, counsel contends that the deadline would have been near the end of January 1998. However, the author was removed on 23 December 1997. This damage could not be undone regardless of the outcome of any judicial review application. The author had every intention of proceeding with an application for judicial review of the Minister's decision, and counsel appeared in Federal Court on 20 December 1997 to seek a stay of the removal pending the outcome of this application. Unfortunately, the Federal Court chose to render a decision on what counsel views as the merits of the author's claim to refugee status. The result was that the author was deported three days later. The State party has failed to mention what procedure would be used to bring the author safely back to Canada had the Minister been compelled by the Court to render another decision.

Further observations from the State party on admissibility

6.1 In a further submission dated 9 October 1998 the State party contends that upon receiving a decision like that of the adjudicator in the instant case, a refugee claimant represented by counsel would not have assumed that he could proceed with his refugee claim. The adjudicator determined that the author was a person who had been convicted outside of Canada of an offence that if committed in Canada would constitute an offence punishable by a maximum term of imprisonment of 10 years or more and was also a person who there were reasonable grounds to believe had engaged in terrorism. A reasonable person represented by counsel receiving such a determination would have anticipated that action would be taken to have the individual excluded from the refugee determination process. Indeed, such a determination would suggest that the claimant might be excluded from the definition of a Convention refugee in section F of article 1 of the Convention relating to the Status of Refugees, which was incorporated by reference into the Canadian Immigration Act.

6.2 Moreover, the author had been advised, subsequent to the first inquiry held, that CIC intended to seek the Minister's opinion that the author constituted a danger to the public, the consequence upon issuance of such opinion being that he would be excluded from the refugee determination process. The author sought judicial review of this earlier determination and was therefore aware of the potential consequences of an adjudicator's finding that he was inadmissible.

Counsel's comments

7. Counsel argues that the adjudicator's finding was very specific (i.e. that the author had been convicted of an offence and that there were reasonable grounds to believe he had engaged in acts of terrorism). The scope for judicial review of such a finding is limited to whether the adjudicator made an error in law or whether his findings of fact were perverse, capricious or patently unreasonable. Whether or not the author agreed with the decision, it was not possible to attack it on any of these grounds based on the evidence presented. Counsel's duty is to determine whether it is in the client's best interest to pursue an appeal when there is little merit in doing so. Counsel would hesitate to launch a frivolous application before the courts simply to delay further proceedings.

State party's comments on the failure to observe the Committee's request under rule 108 (9) of its rules of procedure

8.1 On 24 June 1998 the Committee invited the State party to submit written comments on the failure to observe the request not to expel the author to India while his communication is under consideration by the Committee.

8.2 In its response to the Committee the State party indicates that an interim measures request is a recommendation to a State to take certain measures, not an order. Support for this proposition may be found not only in the word employed ("request") in rule 108, paragraph 9, but also in the European Court of Human Rights decision in *Cruz Varas and Others v. Sweden*. The Court stated the following with respect to the legal status of an interim measures request: "Firstly, it must be observed that Rule 36 [regarding interim measures] has only the status of a rule of procedure drawn up by the Commission ... In the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties."

8.3 Pursuant to rule 108, paragraph 9, an interim measures request may be issued in order to avoid "irreparable damage" to an author. The State party submits that the examination of possible irreparable harm should be a rigorous one, particularly when the individual concerned was found to represent a danger

to the public or, as in the author's case, whose continued presence in the State was determined to be contrary to the public interest. On the basis of the documentary evidence submitted by the author as well as their own evidence regarding the author's risk upon removal to India, the authorities concluded that the risk was minimal. Moreover, a judge of the Federal Court Trial Division determined that the risk to the author was not sufficient to justify a stay of his removal.

8.4 The Government of Canada first became aware that the petitioner had submitted a communication, including a request for interim measures, when the author's counsel alluded to the Committee's granting of the request during a discussion with a CIC official on 18 December 1997, three months after the Committee had received the author's communication and request for interim measures. The record before the Committee reveals that the interim measures request was issued, after several appeals by the author's counsel to the Committee, a few days before his scheduled removal. The Government of Canada was not aware of these appeals nor was it given the opportunity to comment on these *ex parte* communications with the Committee.

8.5 In summary, irrespective of their legal status, interim measures requests received from the Committee are given serious consideration by the State party. However, the State party determined that the present case was not an appropriate one for a stay to be granted, in the light of the above-mentioned factors and in particular: (a) the *prima facie* absence of substantial personal risk to the author, as determined by the risk assessment conducted; (b) the fact that the continued presence in Canada of a convicted terrorist would be contrary to the public interest; and (c) the non-binding nature of the Committee's request.

Counsel's comments

9.1 Counsel contends that it has never been his position that the State party was legally obliged to comply with the Committee's interim measures request. He does argue, however, that the Canadian public would normally expect its Government to comply with a request from the United Nations. This is consistent with convention, past practice and the State party's self-image as a humanitarian member of the international community.

9.2 The State party could not possibly have given serious consideration to the interim measures request, in view of the fact that after learning of the request on 18 December 1997 it continued to act single-mindedly to effect the author's removal by opposing an application for a stay of deportation pending a review of the Minister's finding that it would be contrary to the public interest to allow the author to proceed with his refugee claim. The State party chose to rely on its position that the Minister had already conducted a risk assessment with respect to the author and that nothing further was required. The author was not able to do anything but make preliminary written submissions. There was no oral hearing, no ability to call or cross-examine witnesses, no proper disclosure of "internal State documents", and so on. The State party justifies its actions on the basis that the Federal Court dismissed the author's application for a stay of removal. However, the Federal Court's finding with respect to the stay application was not subject to review. It is the finding of one judge, with whom the author disagrees. If the author had appeared before any number of other judges in the Federal Court the result of the stay application might have been different.

The Committee's decision on admissibility

10.1 At its twenty-first session, the Committee considered the question of the admissibility of the communication and ascertained that the same matter had not been and was not being examined under another procedure of international investigation or settlement. With regard to the exhaustion of domestic

remedies, the Committee noted that the author applied for an interim order staying the execution of the deportation order, which was dismissed by the Federal Court Trial Division on 22 December 1997. As a result of a further request from the author, the Court issued a supplementary decision according to which the author had not shown that it would be demonstrably probable that he would face torture upon return to India. The author also applied for leave for judicial review of the Minister's decision that it would be contrary to the public interest to have his refugee claim heard. However, the author was expelled before the deadline for perfecting the application. The Committee also noted that the author failed to seek leave for judicial review of the adjudicator's decision that he belonged to an inadmissible category. However, the Committee was not convinced that this remedy would have been an effective and necessary one, in view of the fact that the other remedies, mentioned above, were available and, indeed, utilized.

10.2 The Committee therefore decided that the communication was admissible.

State party's observations on the merits

11.1 In its submission of 12 May 1998, the State party states that according to the principle laid down in the case *Seid Mortesa Aemei v. Switzerland*,[a] the Committee has to determine "whether there are substantial grounds for believing that [the author] would be in danger of being subjected to torture [in the country to which he is being returned]" and "whether he would be personally at risk". It also recalls that the burden of proof is on the author to establish that there are substantial grounds to believe that he or she would be personally at risk of being subjected to torture.

11.2 The State party submits that since the protection provided by article 3 is, according to the Committee's jurisprudence, absolute, irrespective of the author's past conduct, the determination of risk must be particularly rigorous. To that purpose, reference is made to a decision of the European Court of Human Rights (*Vilvarajah and others v. United Kingdom*), where it is stated, with regard to article 3 of the European Convention on Human Rights, that "the Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision".

11.3 In order to assess the risk of torture faced by the author, the State party contends that the following factors are pertinent: (a) whether the State concerned is one in which there is evidence of a consistent pattern of gross, flagrant or mass violation of human rights; (b) whether the author has been tortured or maltreated by or with the acquiescence of a public official in the past, (c) whether the situation referred to in (a) has changed; and (d) whether the author has engaged in political or other activity within or outside the State concerned which would appear to make him particularly vulnerable to the risk of being tortured.

11.4 The State party acknowledges that the human rights record of India is of concern, but underlines that the situation, particularly in the Punjab, has significantly improved over the two years preceding the State party's submission, which should be given due attention by the Committee when considering the present case.

11.5 According to the State party, several measures have been taken to ensure greater respect for human rights in India since the Government took office in June 1996. The signing by India of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 October 1997, indicates its intention to take steps to prevent and sanction any acts of torture occurring in the territory. Even though the State party acknowledges the human rights abuses, including "disappearances", perpetrated by the Punjab police between 1984 and 1995, reliable sources of information attest to

[a] Views, Communication No. 34/1995, CAT/C/18/D/34/1995, 9 May 1997.

significant progress since 1995 in "reigning in" the Punjab police and providing redress to victims of earlier abuses. According to the US Department of State, "the pattern of disappearances prevalent in the early 1990s appears to be at end" and action has been taken against several of the police officials implicated.[b]

11.6 The State party also refers to other supporting documentation to the effect that while in the late 1980s and early 1990s human rights violations by the police were tolerated and overlooked by the Government, steps have since been taken to ensure that perpetrators do not go unpunished.[c] An indication of this change is the revival of many cases against Punjab police officers which had been pending before the Supreme Court for many years and the initiation of recent investigations led by the Central Bureau of Investigation. These actions confirm that impunity for the Punjab police has come to an end and, although some violations might still occur, the probability of future cases of disappearances involving the Punjab police is very low.[d] It is finally noted that judicial protection for persons detained or arrested has improved. A person who claims to have been arrested arbitrarily will be able to inform a lawyer and have judicial access.

11.7 With reference to the above-mentioned sources, the State party considers that torture is not currently prevalent in Punjab. The same documentary evidence also demonstrates that torture is not practised in all parts of India and that the author would therefore not be at risk.

11.8 The State party further argues that there is no evidence that the author has been tortured by the Indian authorities in the past or since his return to India. It refers to press articles stating that the author has not been subjected to torture during questioning, the Indian authorities being very conscious of the international scrutiny of their treatment of the author.[e]

11.9 It is also submitted by the State party that the Indian authorities would not have any opportunity to torture the author since he has already been convicted and served his sentence. India has indeed assimilated the principle of *non bis in idem* both in its Constitution and by adhering to the International Covenant on Civil and Political Rights, which contains the principle in its article 14 (7). The fact that there are no new charges against the author is also consistent with the fact that India has not requested the author's extradition. Finally, the State party mentions that the Deputy Commissioner of Police has confirmed in the press that no action could be taken against the author since he has already been convicted and served his sentence.

11.10 With regard to the affidavit of the author's niece, the State party claims that it constitutes hearsay in that she repeats statements she believes the author made. Furthermore, the statement of the niece that "the CBI investigator then threatened [her] uncle that they would stay around him", even if true, would not be totally unreasonable given the past history of the author and does not demonstrate a risk of torture. Moreover, the State party argues that the facts presented in the affidavit do not amount to "mental torture" as they do not meet the requirements of article 1, paragraph 1, of the Convention. The Indian authorities have indeed not committed any act with the intention of causing the author severe mental pain or suffering.

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[b] US State Department, *India Country Report on Human Rights Practices for 1996*.

[c] The Documentation, Information and Research Branch, Immigration and Refugee Board, "*India: Information from Four Specialists on the Punjab*", Ottawa, 17 February 1997.

[d] *Ibid*.

[e] "Hijacker OK in the old country: An Indo-Canada newspaper reports an assurance that Tejinder Pal Singh will be safe in India", *Vancouver Sun*, 5 January 1998.

11.11 Concerning the reference in the original communication to the 1990 killing of two acquitted hijackers who attempted to enter India, the State party does not see the relevance of this event to the present case and does not see any similarity between them. The State party emphasizes the absence of similarity between the two cases in that the author has not presented evidence of any risk to his family members whereas in the other case, the family had suffered continuous harassment from the Indian authorities. The author quotes a Canadian CIC case officer according to whom the author would be "dealt with harshly, possibly because of hijacking of the Indian plane" if he were to return to India. The State party states that the comment was made in the context of a decision review hearing in which it was the officer's duty to raise concerns about the potential risk that the author would flee, but she was not commenting on nor had she sufficient information to determine the level of risk run by the author in case of return.

11.12 Finally, the State party underlines that the evidence of risk that the author could face when returning to India has been carefully reviewed by the Minister of Citizenship and Immigration and that the risk has been deemed minimal. That assessment was confirmed by the Federal Court Trial Division. It is submitted that the Committee should give considerable weight to the findings of the Minister and the Court.

11.13 For the above reasons, the State party is of the opinion that there is no element showing that the author would be put at risk of torture should he return to India.

Comments submitted by the author on the merits

12.1 In a submission dated 11 June 1998, the author argues that the assessment made by the State party of the human rights situation in India on the basis of the documentation submitted to the Committee[f] is misleading. The State party cites remarks out of context, but fails to mention information from the same sources which confirms that abuses continue to occur.

12.2 The author also draws the attention of the Committee to the fact that one of the supporting documents referred to by the State party it is stated: "I began by asking if someone who had fled India during the early 1990s, at the height of the troubles, would have reason to fear returning to Punjab now. I also asked if it was possible for someone on the run to hide within an existing community of Sikhs in a city or region outside the Punjab. The answer to both these questions, and a constant theme of the interview, was that only the highest profile fugitives, which they said would number a handful, would have reason to fear, or to be pursued outside the Punjab."[g] The author also calls attention to the fact that these comments were made prior to the elections of February 1997, when the human rights situation degenerated.

12.3 To support his statements on the current human rights situation in Punjab, the author refers to information from the Research Directorate of the Immigration and Refugee Board in Ottawa which reports that torture in custody remains a problem in India, and particularly in Punjab. Moreover, it asserts that the recent prosecutions of police officers are not indicative of a real change in the respect for human rights and constitutional guarantees. Finally, it states that the persons in danger are the ones who are still part of active nationalist groups or refuse the demands imposed by the State, such as when the police require a person to become an informant, which is, the author observes, exactly what happened in his case. The

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[f] US State Department, *India Country Report on Human Rights Practices for 1996; Human Rights World Report 1997*.

[g] See note c above.

author also refers to the response to information requested from the Research Directorate of the Immigration and Refugee Board in Ottawa prepared for the United States Immigration and Naturalization Service as to the situation in Punjab in 1997, indicating that despite a general improvement over the years and "although militants and close affiliates of militants are the key category of individuals at risk, political activists and also human rights activists may also have well founded fears of persecution in India".[b]

12.4 In the light of the above, the author draws the attention of the Committee to the inconsistency of the State party in its assessment of the risk run by the author of being subjected to torture in India. The author argues that when deciding that the author would be denied refugee status, the Canadian authorities portrayed him as a high-profile militant terrorist and Sikh nationalist. However, when considering the author's return to India and the risks he would run, the State party no longer portrayed him as such.

12.5 Regarding the risk faced by the author of being subjected to torture, it is noted that ascertaining a risk of torture in the future does not require evidence of torture in the past, particularly since the author has not been in India since being imprisoned in Pakistan. At this stage, the only evidence of risk available is the author's niece's affidavit. As was underlined by the author, there was no evidence of actual torture, but the affidavit should be considered as demonstrating the risk of such treatment. Moreover, the fact that there is no legal basis to arrest the author at present is of even more concern since the human rights record of India is filled with examples of extrajudicial behaviour.

12.6 The author further insists on the similarity between his case and that of Gurvinder Singh, referred to in the initial communication. The latter was tried with eight other persons and acquitted of a 1984 hijacking of a plane travelling from India to Pakistan. He was later shot at the border with Pakistan while he was trying to return to India. The author was tried with four others for a 1981 hijacking. In all, 14 persons have been labelled by the Indian authorities as terrorists and have consistently been linked together, regardless of the differences between the circumstances of the hijackings or whether they were acquitted or convicted. This is illustrated by a letter from the Indian Central Bureau of Investigation to the Canadian High Commission in New Delhi dated 24 July 1995 referring to a collection of photographs of each of the alleged hijackers. This is not only an indication that these 14 persons are treated in the same way, but also that the Indian authorities are particularly interested in their return to India and that the State party has cooperated with the Government of India since at least 1995. The Committee should therefore take into consideration anything that has happened to any of these 14 persons in its assessment of the author's risk.

Additional comments by the State party

13.1 In its submissions dated 9 October 1998, 7 June 1999, 30 September 1998 and 28 February 2000, the State party transmitted additional observations on the merits.

13.2 The State party argues that although high-profile militants may be at risk in India, the author does not fall within this category, which would include a perceived leader of a militant organization, someone suspected of a terrorist attack, or someone suspected of anti-State activities. The author cannot be characterized as any of these. Although he committed the hijacking of 1981, he was convicted for his crime, served his sentence, and was presumably not involved in militant activities during his time in prison nor is he currently involved in such activities. In a further submission, the State party states that it has never disputed that the author could be considered as "high-profile". However, it does not consider that the author falls into the small category of "high-profile militants" at risk.

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[b] Documents IND26992.E of the Research Directorate of the Immigration and Refugee Board in Ottawa, p. 3.

13.3 The State party requests the Committee to give little weight to the "section 27 report" because it is a document prepared by a subordinate immigration officer that only indicates that the person may be inadmissible to Canada. The definitive decision is going to be taken by a senior immigration officer and only that is subject to judicial review. Furthermore, the "section 27 report" merely mentions that the author is a member of the Dal Khalsa. It is indeed submitted that the mere membership to a terrorist organization does not make a person a "high-profile militant".

13.4 The State party strongly denies any cooperation with the Indian authorities in the search for the author and confirms that it did not receive any request from India to return the author. The correspondence mentioned by the author in its previous submission does not indicate that the Indian authorities were searching for him but rather that the State party was concerned by the possible arrival on its territory of released hijackers and wanted to identify them. Contrary to the assertions of the author that India was interested in his return, the State party has never received any indication of such interest. Even if India had shown interest in the return of the author, that would not have proved that he was at risk of torture.

13.5 With regard to the arrival of the author at the airport in Delhi, where it was stated that there were over 40 police and army officers waiting, the State party reiterates that the accompanying officer confirmed that the author was dealt with in a normal fashion.

13.6 The State party argues that the letter presented by the author to the Committee referring to his experience in India since his arrival is only an expression of his views and therefore does not constitute sworn or tested evidence. The Committee should give little weight to this document. It is also submitted that the alleged harassment endured by the author does not constitute evidence that he is at risk of torture. Moreover, at the time of the submission, the author has been back in India for almost two years and it seems that there has been no escalation in the manner in which he has been treated by the authorities.

13.7 The State party first underlines that whereas the author alleges to be at risk of "persecution", even though this expression may be a simple oversight on the part of the author, the State party recalls that the issue before the Committee is whether or not the author is at risk of "torture", and not of "persecution". It is contended that the risk of torture as defined in the Convention imposes a higher and more precise standard than the risk of persecution in the 1951 Convention relating to the Status of Refugees. In the present case, the State party reiterates its view that the author is not at risk of torture.

Additional comments made by the author

14.1 In further submissions dated 28 October 1998, 30 May 1999, 14 July 1999 and 26 November 1999, the author states that as part of its policy, the State party is trying to restrict entry to its territory, so that since 1996 the rate of acceptance of refugee claimants has dropped dramatically, particularly for asylum-seekers from Punjab. Even though the author acknowledges the need to combat abuse by economic migrants and fraudulent claimants, this does not justify the unrealistically favourable portrayal of the situation in Punjab.

14.2 The author's counsel requests the Committee to consider a letter, dated 2 December 1998, written by the author, revealing the troubles he has experienced since his return to India. The author states that he received threats from the police upon arrival from Canada for not having given them the information they wanted. He and his family have been harassed by the police since his return so that he is not able to see them anymore. Following his filing a complaint with the Punjab Human Rights Committee, he has been forced to sign a statement absolving the police of any wrongdoing. According to counsel, these acts

constitute "slow, methodical mental torture" for the author, and there is no need to wait for evidence of physical torture.

14.3 It is also disputed by counsel that the actions of the Indian Central Bureau of Investigation on his return to India do not constitute "mental torture". It is argued that the State party has to consider these actions together with the other difficulties faced by the author and his family since his arrival and the general human rights situation in India. Secondly, it is inappropriate that the State party uses *ex post facto* elements, i.e. that the author has not been tortured since his return to India, to justify its decision to expel the author. Counsel contends that the author is currently a victim of torture, but that even if that were not the case, the Committee should determine if the author is and was at the moment of deportation from Canada, at substantial risk of torture.

14.4 With regard to personal risks, counsel argues that the author has provided enough evidence in his letter and his niece's affidavit that he has been at substantial risk of torture since he arrived in India and that the Indian authorities maintain a high level of interest in him. Along these lines, it is reaffirmed that the deportation of the author is a disguised extradition even though there were no elements for requesting a formal extradition.

14.5 Counsel draws the attention of the Committee to additional sources that dispute the State party's assertion that the human rights situation in Punjab has improved.[1] Counsel submits that the sources confirm that the situation of human rights workers deteriorated at the end of 1998. Counsel also refers to information indicating that persons who have presented complaints before the People's Commission have been visited by the police and threatened with elimination or arrest on false charges.

14.6 Counsel argues that the State party has not been consistent in its risk assessment. While it is currently portraying the author as a person of no interest to the Indian authorities, it has previously qualified him as a high-profile militant, including pointing to his links with the Dal Khalsa, a known pro-Khalistan organization, the fact that he had intimated to the immigration authorities that he could "crush anyone with his thumb", as well as evidence of him having given pro-Khalistan, anti-Indian government statements. In this sense, the argument of the State party that the author is not a high-profile militant is, according to counsel, fallacious. Counsel further presents additional information in order to demonstrate that the author is indeed a "high-profile militant": a comment made by the British Broadcasting Corporation in May 1982 on the Dal Khalsa, characterizing it as an anti-national, secessionist, extremist organization; and an article from *The News International* of October 1994 on the author himself, qualifying him clearly as a militant. Counsel finally refers to information contained in the Canadian Government own file, relating to the removal of the author from Canada ("section 27 report"), dated 30 November 1995, indicating that the author "is a member of the Dal Khalsa, a known terrorist organization". Counsel emphasizes the present tense used in the sentence to demonstrate that neither the existence of the Dal Khalsa nor the affiliation of the author to the latter belongs to the past. According to counsel, these elements are a clear indication that the State party was indeed considering the author as a high-profile militant and therefore knew of the risk run by the author if he returned to India.

Issues and proceedings before the Committee

15.1 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to India. In reaching this decision, the Committee must take into account all relevant considerations,

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[1] Documents IND30759.EX and IND26992.E of the Research Directorate of the Immigration and Refugee Board in Ottawa.

pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

15.2 The Committee first notes that the author was removed to India on 23 December 1997, despite a request for interim measures pursuant to rule 108 (9) of the rules of procedure according to which the State party was requested not to remove the author while his communication was pending before the Committee.

15.3 One of the overriding factors behind the speedy deportation was the claim by the State party that the "author's continued presence in Canada represents a danger to the public". The Committee, however, is not convinced that an extension of his stay in Canada for a few more months would have been contrary to the public interest. In this regard, the Committee refers to a case of the European Court of Human Rights (*Chahal v. United Kingdom*) which requires that scrutiny of the claim "must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State".

15.4 As for the merits of the communication, the Committee notes that the author has now been living in India for more than two years. During this time, although he claims to have been harassed and threatened along with his family, on various occasions by the police, it seems that there was no escalation in the manner in which he has been treated by the authorities. In these circumstances, and given the substantial period that has elapsed since the author's removal – ample time for the allegations of the author to have materialized – the Committee cannot but conclude that such allegations were unfounded.

15.5 The Committee is of the opinion that after a period of nearly two and a half years, it is unlikely that the author would still at risk of being subjected to acts of torture.

16.1 The Committee considers that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee. The Committee is deeply concerned that the State party did not accede to its request for interim measures under rule 108, paragraph 3, of its rules of procedure and removed the author to India.

16.2 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the author's removal to India by the State party does not constitute a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Individual opinion of Committee member Guibril Camara

1. Under rule 108, paragraph 9, of its rules of procedure, the Committee against Torture may take steps to avoid a violation of the Convention and, therefore, an irreparable damage. This provision is a logical attribute of the competence bestowed on the Committee under article 22 of the Convention, concerning which the State party has made a declaration. By invoking article 22, the author of a communication submits an enforceable decision to the Committee's judgement, with due regard to the requirement for the exhaustion of domestic remedies. Therefore, if such decision is enforced despite the Committee's request for suspension, the State party renders article 22 meaningless. This particular case is basically a matter of lack of respect, if not for the letter, then for the spirit, of article 22.

2. Moreover, it is clear from the terms of article 3 of the Convention that the time to assess whether "there are substantial grounds for believing that [the author] would be in danger of being subjected to torture" is at the moment of expulsion, return or extradition. The facts clearly show that, at the time of his expulsion to India, there were substantial grounds for believing that the author would be subjected to torture. The State party therefore violated article 3 of the Convention in acting to expel the author.

3. Lastly, the fact that in this case, the author was not subsequently subjected to torture has no bearing on whether the State party violated the Convention in expelling him. The question of whether the risk – in this case, of acts of torture – actually materializes is of relevance only to any reparation or damages sought by the victim or by other persons entitled to claim.

4. The competence of the Committee against Torture should also be exercised in the interests of prevention. In cases relating to article 3, it would surely be unreasonable to wait for a violation to occur before taking note of it.

[Done in English, French, Russian and Spanish, the French text being the original version.]

5. Communication No. 107/1998

Submitted by:	K.M. [name deleted] [represented by counsel]
Alleged victim:	The author
State party:	Switzerland
Date of communication:	23 February 1998

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 16 November 1999,

Having concluded its consideration of communication No. 107/1998, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication and the State party,

Adopts the following decision:

1.1 The author of the communication is Mr. K.M., a Turkish citizen of Kurdish ethnic origin, born in 1972, currently living in Switzerland where he has applied for asylum. His application, however, has been rejected and he is at risk of expulsion. He alleges that his forced return to Turkey would constitute a violation by Switzerland of article 3 of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 11 March 1998. At the same time the State party was requested, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, not to expel the author to Turkey while his communication was under consideration by the Committee. In a submission of 15 April 1998 the State party informed the Committee that measures had been taken to ensure that the author would not be returned to Turkey while his case was pending before the Committee.

The facts as submitted by the author

2.1 The author comes from the south-eastern part of Turkey. He states that, although sympathetic towards the cause of the Kurdish Workers' Party (PKK) he was not involved in political activities. He performed his military service with the Turkish army in 1992-1993. He ran a shoe shop together with his father in the village of Gaziantep. Although not politically active, he was arrested by the police on two occasions in August and September 1994, on suspicion of helping the PKK, and was kept in detention for a brief period. During one of his detentions he was severely beaten, resulting in the loss of one of his teeth and damage to others. On both occasions he was released without charge.

2.2 In early 1995 a member of the PKK whom they did not know contacted the author and his father and asked them to supply the organization with a large quantity of shoes. Being sympathetic towards the organization, the author and his father accepted the deal and shoes were supplied on a weekly basis. According to the author, his cousin, who was working actively for the PKK and came sometimes to collect the weekly ration of shoes, was arrested by the Turkish police in March 1995 while in possession of the shoes. Under torture he informed the police that the author was making shoes for the PKK. The police then looked for the author at his domicile, but the author managed to escape and hide. His father was arrested in order to make the author show up. The author decided to leave the country and arranged his departure with the help of smugglers. He later learned that his cousin had been killed while trying to escape from prison.

2.3 The author arrived in Switzerland on 20 April 1995 and immediately applied for asylum. The Federal Office for Refugees (ODR) rejected his application on 14 November 1996. On 12 January 1998 the Appeal Commission for Asylum Matters (CRA) turned down the author's appeal.

2.4 The author complains that his interviews with the Swiss asylum authorities were conducted without the assistance of a lawyer and disagrees with the arguments used by those authorities to conclude that he lacked credibility and reject his application. The Swiss authorities indicated that there were a number of

contradictions in the information supplied by the author during his three interviews with asylum officers. Those contradictions concerned, *inter alia*, the author's profession, the request he had received to make shoes for the PKK and the arrests to which he had been subjected in 1994. The author provides the Committee with detailed explanations designed to demonstrate that there are no such contradictions and that he has told the truth about the reasons that motivated his departure from the country.

2.5 The author provided the Committee with a document issued by the prosecutor of Gaziantep, dated 28 March 1995, indicating that he was wanted by the police. The document was considered by the Swiss authorities as a fake. The author disagrees with that conclusion and complains that, contrary to the usual practice, the Swiss authorities never asked the Swiss Embassy in Ankara to verify the authenticity of the document.

The complaint

3.1 The author claims that his forcible return to Turkey would constitute a violation of Switzerland's obligations under the Convention, since in view of the reasons that motivated his departure from Turkey, there are substantial grounds to believe that he would risk imprisonment, torture and even extrajudicial killing upon return.

The State party's observations on the admissibility and merits of the communication

4.1 *The State party did not contest the admissibility of the communication and made observations on* its merits in a letter dated 13 August 1998.

4.2 The State party informs the Committee of the discrepancies which the authorities have found to exist during their interviews with the author. The State party notes, for example, that his account of the order for mountain shoes for PKK soldiers is strewn with contradictions and inconsistencies. These relate to an essential point of the communication, namely, the grounds for the persecution to which the author was allegedly subjected by the authorities of his country. The State party also considers that the statements by the author regarding the circumstances in which he allegedly received the order for shoes cannot be reconciled with the situation with which members of the PKK are faced. It does seem surprising, at the very least, that a member of a terrorist movement, at war with the current regime, which has mobilized the main forces of the country against it, would arrive one day at the home of strangers and ask them to support the armed struggle, in broad daylight and without taking the slightest precaution. To accept the author's version would be to ignore that the PKK must have instituted a whole system of security measures, such as strategies for identifying its members, in order to safeguard their lives so as to continue the armed struggle. In this regard, it is interesting to note that, by the author's own account, it is well known that the secret police and its informers are present in all areas of civil society. A genuine PKK member could not be ignorant of this fact and would not have rashly exposed himself to danger as the author claims.

4.3 The State party finds it astonishing that an individual suspected by the police in August 1994 of having given support to the PKK should spontaneously accept, at the beginning of 1995, a stranger's suggestion that he should produce shoes for the movement, without for a second imagining that the security services might have been trying in this way to confirm their suspicions about him.

4.4 The State party also contests the reality of the proceedings instituted by the police against the author. The author stated that his father had also made shoes for the PKK; however, the father was never subjected to any criminal prosecution for participation in terrorist activity, but was only arrested and interrogated with regard to his son. The leniency shown by the Turkish authorities to the author's father

is completely inexplicable. Even if the cousin did not denounce the author's father, the fact remains that the father also made shoes for the PKK or at least allowed them to be made in his workshop. Thus, the father's behaviour would doubtless have justified the opening of a criminal investigation against him since he had, as the owner of the workshop, given his support to a terrorist movement. In fact, the father has never been bothered on these grounds by the national authorities.

4.5 Moreover, the author stated that his cousin had been sentenced to five years' imprisonment and that he had informed the police that the author had made the shoes. However, the author has never produced an extract from the judgement in question, which, if it had really existed, could have proved that he had been his cousin's accomplice.

4.6 With regard to the future persecutions to which the author would allegedly risk being exposed on returning to his country, the State party informs the Committee that, following the request of the ODR dated 3 April 1998, the Swiss embassy in Ankara made inquiries regarding the situation of the author in Turkey. By letter of 21 April 1998 the embassy confirmed that the police had no political file on the author and no record of his having committed a criminal offence, that he was not wanted by the police or the armed special police at the national or local level and was not prohibited from holding a passport.

4.7 On the basis of this recent information, the author could surely no longer seriously maintain that the letter from the Office of the Public Prosecutor in Gazantiep was authentic. The Swiss authorities were, moreover, convinced that the document was a forgery. Firstly, it was an internal official letter which would normally not be intended, at least in this form, to be handed over to the wanted person. Secondly, the quality of the paper used and the absence of any of the official indications that generally appear on this type of document according to the specialized service of the ODR, led to the conclusion that the author had had the document forged by friends or relatives.

4.8. The author also made contradictory statements regarding the dates and duration of his alleged arrests in 1994. He firstly stated that the two arrests had taken place in August 1994, and subsequently in September and October 1994; that they had lasted, respectively, three days and one day, and then only one day. It is therefore quite likely that the dental damage suffered by the author was caused by some other incident than that indicated by him, for example an accident at work. The dental certificate in no way confirms the statements by the author with regard to the cause of the damage. Moreover, it can be seen from the communication that the author did not leave Turkey because of these events, which leads one to suppose that there is no causal link between them and the grounds for the future persecution which the author claims he will suffer if he returns to his country.

Counsel's comments

5.1 Counsel reiterates the explanations he had already provided regarding the contradictions in the author's statements referred to by the State party. As for the document from the prosecutor of Gazantiep, the State party seems to suggest that the author asked his relatives to produce a false document. The author asked his father to send him evidence, not to forge a document. He does not know how his father obtained the document but there is nothing to indicate that the document is a forgery. In a telephone conversation on 23 December 1996, the father told counsel that he had had to go to the police station several times in order to obtain the document.

5.2 As for the argument that the author was unlikely to place himself at risk again, counsel claims that many Kurds in Turkey are suspected by the police of collaborating with the PKK, in spite of which they continue to work for the organization.

5.3 As for the argument that the author's father should have been prosecuted, counsel says that the father is a sick old man who does not belong to the sector of the population that normally joins the guerrilla movement, i.e. the younger generation. The author, however, clearly informed the Swiss authorities that his father had been held in police custody for one week, during which time he was questioned two or three times about his whereabouts.

5.4 Counsel considers that it is not realistic to ask the author to provide a copy of his cousin's criminal record. The author left Turkey shortly after his cousin's arrest and does not know whether his cousin had a lawyer. Only a lawyer would have been in a position to provide such documents, since his cousin's wife, children and mother left the country and the author has no contact with them. Counsel says that the Swiss authorities should have been able to obtain that kind of document.

5.5 Counsel adds that the PKK member who contacted him and his father and asked them to make the shoes knew through the author's cousin that the author and his father were PKK sympathizers, so that he did not run the kind of risk referred to by the State party.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee also notes that all domestic remedies have been exhausted and that the State party has not contested the admissibility of the communication. It therefore considers that the communication is admissible. Since both the State party and the author's counsel have provided observations on the merits of the communication, the Committee proceeds with the consideration of those merits.

6.2 The issue before the Committee is whether the forced return of the author is Turkey would violate the obligation of Switzerland under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Turkey. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist indicating that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

6.4 The Committee recalls its general comment on the implementation of article 3 which reads:

> "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on

grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 6).

6.5 In the present case the Committee notes that the State party draws attention to a number of inconsistencies and contradictions in the author's account, casting doubt on the truthfulness of his allegations. It also notes the explanations provided by counsel in that respect. The Committee considers, however, that those inconsistencies and contradictions are not of such nature as to be relevant for the assessment of the risk under which the author might be if he is returned to Turkey.

6.6 From the information submitted by the author the Committee observers that the events that prompted his departure from Turkey date back to 1995. The author provided the Swiss authorities with a document allegedly issued by the Office of the Public Prosecutor of Gazantiep, soon after his departure, as evidence of proceedings initiated against him for his links with the PKK. The Swiss authorities considered that the document in question was a forgery. In the Committee's opinion the explanations provided by the author to demonstrate that the said document is authentic are not convincing. Furthermore, the Committee notes the information provided by the Swiss embassy in Ankara according to which the police has not established a dossier on the author and he is not under an order of arrest. Accordingly, the author has failed to demonstrate that he is under risk of being arrested upon his return. The Committee further notes the author's allegations that his father was arrested by the police and questioned about his whereabouts. However, the arrest in question took place in 1995. There is nothing to suggest that the author or members of his family have been sought or intimidated by the Turkish authorities since then. There is nothing to suggest either that the author has collaborated with the PKK in any way since leaving Turkey in 1995.

6.7 The Committee notes with concern the numerous reports concerning the use of torture in Turkey, but recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

6.8 On the basis of the above considerations, the Committee is of the opinion that the information before it does not show substantial grounds for believing that the author runs a personal risk of being tortured if he is sent back to Turkey.

7. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the author to Turkey does not constitute a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the French text being the original version.]

6. Communication No. 116/1998

Submitted by:	N.M. [name deleted] [represented by counsel]
Alleged victim:	The author
State party:	Switzerland
Date of communication:	10 July 1998

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 9 May 2000,

Having concluded its consideration of communication No. 116/1998, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication and the State party,

Adopts the following decision:

1.1 The author of the communication is Mr. N.M., a citizen of the Democratic Republic of the Congo (DRC) born on 10 January 1968 and currently residing in Switzerland, where he applied for asylum on 1 December 1997. His application having been turned down, he maintains that his forcible repatriation to the DRC would constitute a violation by Switzerland of article 3 of the Convention against Torture. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 23 September 1998. At the same time, the State party was requested, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, not to expel the author to the DRC while his communication was under consideration by the Committee. In a submission dated 23 November 1998, the State party informed the Committee that steps had been taken to ensure that the author was not returned to the DRC while his case was pending before the Committee.

The facts as submitted by the author

2.1 The author claims he worked in Kinshasa between 1992 and 1997 as an employee of a company called Hyochade, belonging to Mr. Kongolo Mobutu, the son of former President Mobutu. According to the author, this company was a cover for plundering the wealth of the country in various ways, such as extorting money from foreign businessmen or organizing demonstrations that required State authorization. It paid no taxes and had no administrative obligations. Acting on behalf of the regime, it also carried out

propaganda activities and kept track of members of the political opposition in order to keep them under some kind of control.

2.2 The author explains that his work consisted of acting as an intermediary in certain business transactions, such as obtaining permits for foreign businessmen. But his responsibilities also included collecting information on members of the opposition within a particular geographical area and denouncing any subversive activities. One day, he denounced a friend's father, who was subsequently tortured to death. The author states that he reported to his supervisors at least every two months and was generously paid. In addition to his salary, he received a bonus when he denounced someone and he enjoyed a whole range of other privileges.

2.3 During this period, he was warned by both friends and enemies that his activities might one day be dangerous for him. His parents, particularly his father, tried to persuade him to leave the job and return to university. The author eventually left Hyochade in January 1997 and stayed with his parents while waiting for an opportunity to go back to university.

2.4 On 17 May 1997, the rebellion led by Mr. Kabila reached Kinshasa. On the night of 18 June 1997, soldiers burst into the author's parents' house to arrest him. As he was not there, the soldiers arrested his father. When he learned what had happened to his family, the author decided to go into hiding in Bas-Zaire, where he stayed with a friend until mid-September. He then caught typhoid fever and decided to return to Kinshasa, where he stayed with his sister.

2.5 On 6 October 1997, his father was released on condition that he report to the military post every two weeks until the author returned. On the day he was released, the father came to visit the author, but was followed by three plain-clothes officers with an arrest warrant and a photograph of him. The author was arrested and taken to the Kokolo military camp. His father was allowed to accompany him only as far as the entrance.

2.6 The author states that he was kept in isolation in a cell for three days without food. He was then taken to the office of the camp commander, where he was informed that he was accused of treason, extortion and complicity in murder. He denied the charges, but was ordered by the commander to be taken away to another cell, where he received a beating, including blows to his genitals, from several soldiers. He was in hospital until 25 November 1997, when a doctor, who had been bribed by his sister, helped him to escape. He decided to leave the country immediately.

2.7 On arriving in Switzerland, on 1 December 1997, he applied for asylum. His application was turned down by the Federal Office for Refugees on 25 March 1998. He then submitted an appeal against this decision, but it was declared inadmissible on 18 June 1998 by the Swiss Appeal Commission on Asylum Matters, on the grounds that the author had not paid the full amount needed to cover the cost of the proceedings until four days after the deadline.

Merits of the complaint

3.1 The author states that, if he were returned to the DRC, he would be tortured and summarily executed. Given the fact that he carried out his professional activities in his own neighbourhood, that he had sent many people from that neighbourhood to be tortured if not to their death, and that he enjoyed many privileges, there are grounds for believing that he has certainly not been forgotten and that, if he returned to Kinshasa, the fate awaiting him would be commensurate with his actions. The numerous documents he has produced during the asylum proceedings also provide substantial reasons for believing that this fear is well founded.

Observations by the State party

4.1 By letter of 23 November 1998, the State party informed the Committee that it did not contest the admissibility of the communication. Nevertheless, in its observations dated 11 March 1999, it requests the Committee to make sure that the same matter is not being examined under another procedure of international investigation or settlement.

4.2 With regard to the merits of the communication, the State party makes it clear first of all that, in accordance with previous decisions of the Committee,[a] it in no way opposes the absolute nature of article 3. It adds, however, that while the author's fears must be analyzed in the light of the general situation prevailing in the country, it must also be determined that any risk is personal, real and foreseeable.

4.3 The State party points out that the author made many contradictory statements during questioning on vital points of his story. For example, the author did not mention the events of 18 June 1997 during his first hearing and even specified that he had had no problem with the new Congolese authorities prior to 6 October 1997. Moreover, the circumstances surrounding his departure from Kinshasa for Bas-Zaire were brought up only during the second hearing. He also contradicted himself with regard to the person who had helped him leave the hospital; the first time he had said it was a nurse and the second time that it was a doctor. Also, while at the second hearing he was able initially to give the doctor's name and approximate address, a little later he could no longer remember. The State party notes that the author has provided no explanation for these contradictions in his communication.

4.4 Furthermore, the State party questions the plausibility of certain facts introduced by the author only towards the end of the proceedings, for no apparent reason other than to strengthen his argument for asylum. In particular, he suggested that working for Hyochade implied that he had to be a member of the People's Revolution Movement (MPR – the single party during President Mobutu's regime). As to reasons for his arrest in October 1997, it was only at the end of the proceedings that he mentioned treason, complicity in murder and embezzlement.

4.5 In the view of the State party, some parts of the author's story are completely implausible, such as the claim that, during his escape, he was wheeled out of the hospital on a bed hidden under a sheet. There are also serious doubts about his escape from the country, since he came to Europe by plane, the most tightly controlled means of transport, although he claims that he was wanted on serious charges.

4.6 The State party considers it surprising that the author produced no medical certificate, even though he claimed to be suffering from the after-effects of the acts of torture to which he had been subjected and that these acts were recent enough for a doctor to determine that they had taken place. No documentary evidence was produced to explain these contradictions in the author's account and hence he cannot use the argument put forward in previous cases before the Committee, whereby "the effects of a post-traumatic stress disorder, as in the case of many torture victims" may account for "the inconsistencies that appear in some statements".[b]

4.7 While acknowledging that a person does not have to have been tortured in the past to have a justifiable fear of being tortured in the future, the State party points out that there is no further evidence in the author's case to prove this risk exists. Referring to the Committee's decision in the case of *Seid*

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[a] *Gorki Ernesto Tapia Paez v. Sweden*, Communication No. 39/1996, section 14.5.

[b] *Babikir v. Switzerland*, Communication No. 38/1985.

Mortesa Aemei v. Switzerland,[c] it thus notes that, even if the author's position in Hyochade really did involve being a member of the MPR, his political activities were not important enough to warrant his persecution by the current Government.

4.8 The State party expresses serious doubts about the author's professional activities and about the very existence of the Hyochade company, since the author has never been able to produce any documents relating to his work for that company, even though he was able to obtain a number of other documents and his family on the spot could have helped him find the papers he wanted. In addition, the State party believes that for the author to be effective as an informant, he would have needed the help of other informants. Yet the author has always maintained that he had been working alone, which appears inconsistent to the State party.

4.9 Regarding the lack of evidence, the State party's comments in the previous paragraph also apply to the author's escape from hospital, insofar as his sister or the person who helped him could have provided a statement.

4.10 Lastly, as far as the general situation in the DRC is concerned, the State party accepts the Committee's observations in the case of *X, Y and Z v. Sweden*[d] and recalls that the Office of the United Nations High Commissioner for Refugees (UNHCR) has not as yet made any recommendations to the effect that asylum-seekers whose applications are unsuccessful should not be sent back to that country.

Additional observations by the author

5.1 In a letter dated 28 April 1999, the author comments on the State party's observations on the merits of the communication.

5.2 With regard to the contradictions found by the State party in the author's accounts, the author refers to the appeal submitted to the Swiss Appeal Commission on Asylum Matters on 30 April 1998, in which all the necessary explanations are given. It is made clear there that, while it had not indeed been recorded during the first hearing that he had had problems with the authorities on 18 June 1997, the author had in fact meant to say that he had not been physically ill-treated by the authorities prior to 6 October 1997. On the same point, the author draws attention to the fact that the problems encountered on 18 June 1997 emerge clearly from the report on the second hearing, which mentions his stay in Bas-Zaire from that date. With regard to the exact status of the person who helped him escape from the hospital, it is pointed out that the author, a novice in that respect, never really knew whether the person was a nurse or a doctor, a distinction which is even more difficult to draw in the DRC. As far as that person's name is concerned, it is natural that the author should have had difficulty remembering it, since, for the sake of security, an accomplice will rarely reveal his name. The author mentioned one name at the beginning of the hearing, but then gave up.

5.3 With regard to the other arguments put forward by the State party, the author refers to the additional statement dated 4 June 1998, which was submitted to the Swiss Appeal Commission on Asylum Matters. In it, the author explains why he chose to travel to Europe by plane and how he organized his trip so that he would not be spotted. He had actually obtained a return plane ticket that belonged to a Zairian citizen residing in Italy. He also states that he no longer has any contact with his family, which means that he is unable to obtain certain documents. Lastly, with regard to his activities on behalf of the

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[c] *Seid Mortesa Aemei v. Switzerland*, Communication No. 34/1995.

[d] *X, Y and Z v. Sweden*, Communication No. 61/1996.

regime and his political activities, the author observes that he was asked very few questions on the subject and so did not have a chance to give all the necessary explanations in reply to the doubts of the authorities responsible for the asylum proceedings.

5.4 The author believes that the State party has not honoured its international commitments in its handling of his application for asylum, particularly in its excessive reliance on a formality (the payment of the 250 Swiss franc deposit for appeal costs four days after the deadline) to declare his appeal to the Swiss Appeal Commission on Asylum Matters dated 30 April 1998 inadmissible.

5.5 The author derives some satisfaction from the State party's observations on his communication, since for the first time the merits of his reasons and arguments have been examined in depth. He regrets, however, that this examination was carried out not by the actual judicial authority normally competent in asylum matters, but by the Government, which, by virtue of the proceedings, is a party in the case and consequently does not have the independence and impartiality of the judiciary.

5.6 The author believes that, by signing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the State party undertook not to expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. To determine the risk involved, the State party must take account of all relevant considerations, including the existence of systematic violations of human rights in the country concerned. The author believes that these relevant considerations have not been examined, since the Swiss authorities dealing with the matter did not at any time consider the merits of his application for asylum.

5.7 With regard to the lack of a medical certificate, the author recalls that he was examined upon his arrival in Switzerland, but, being unfamiliar with the details of the procedure, did not think of asking for an examination of the marks left by the ill-treatment to which he had been subjected.

5.8 In respect of his political activities while working for Hyochade, although his actions were not political in the strict sense of the word, they were serious enough for him to be remembered in Kinshasa. As to the lack of documentation to back up his statements about his work, he adds that there would be no documents relating to his activities at Hyochade at his father's house because of the nature of the company's activities.

5.9 Lastly, the author believes he has provided enough plausible evidence to show that his story is true, believing that any made-up story would never have held together.

Issues and proceedings before the Committee

6.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. It has ascertained, as in accordance with article 22, paragraph 5 (a), of the Convention it is required to do, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. It also notes that all domestic remedies have been exhausted and that the State party has not contested the admissibility of the communication. It therefore considers that the communication is admissible. As both the State party and the author have provided observations on the merits of the communication, the Committee proceeds with the consideration of those merits.

6.2 The issue before the Committee is whether the forced return of the author to the Democratic Republic of the Congo would violate the obligation of the State party under article 3 of the Convention

not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to the Democratic Republic of the Congo. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to the country. There must be other grounds indicating that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

6.4 The Committee recalls its general comment on the implementation of article 3 which reads:

> "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable". (A/53/44, annex IX, para. 6)

6.5 In the present case, the Committee notes that the State party draws attention to a number of inconsistencies and contradictions in the author's account, casting doubt on the truthfulness of his allegations. It also notes the explanations provided by counsel in that respect.

6.6 The Committee finds the arguments advanced by the author in support of his allegations of being tortured before fleeing the Democratic Republic of the Congo to be inconsistent and unconvincing.

6.7 The Committee also finds that it has not been given enough evidence by the author to conclude that the latter would run a personal, real and foreseeable risk of being tortured if returned to his country of origin.

6.8 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the author to the Democratic Republic of the Congo does not constitute a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the French text being the original version.]

7. Communication No. 118/1998

Submitted by:	K.T. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Switzerland
Date of communication:	30 September 1998

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 19 November 1999,

Having concluded its consideration of communication No. 118/1998, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication and the State party,

Adopts the following decision:

1.1 The author of the communication is K.T., a citizen of the Democratic Republic of the Congo born in 1969 and currently residing in Switzerland, where he is seeking asylum and is at risk of deportation. He maintains that sending him back to the Democratic Republic of the Congo would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention the Committee brought the communication to the attention of the State party on 20 October 1998.

Facts as submitted by the author

2.1 The author states that he was a member of the People's Revolution Movement (MPR) from 1992. He was working on behalf of former President Mobutu and promoting Mobutu's interests. He received money from the MPR and had no other occupation. On 10 May 1997, six soldiers loyal to Laurent-Désiré Kabila questioned him and sacked his house. The author hid for four days at the home of his superior in the MPR before leaving the country on 14 May 1997 using a false passport.

2.2 The author entered Switzerland illegally on 5 June 1997 and the same day applied for asylum at the Geneva Registration Centre. By decision of 13 August 1997, the Federal Refugee Office (ODR) rejected the application and gave the author until 30 September 1997 to leave Switzerland. An appeal against that decision was lodged with the Swiss Commission of Appeal in Refugee Matters (CRA). That

appeal was dismissed on 6 August 1998 and a new deadline of 15 October 1998 was set for the author to leave Switzerland.

The complaint

3.1 The author contends that, if sent back to the Democratic Republic of the Congo, he risks being arrested, tortured and even killed by the army or the population, owing to his involvement with the MPR and the fact that President Kabila is currently hunting down all supporters of the former Government. The press and Amnesty International have reported instances of torture and massacres committed by soldiers of the Alliance of Democratic Liberation Forces (AFDL). It is thus a certainty that former supporters of Mobutu are not safe in the Democratic Republic of the Congo.

The State party's observations on the admissibility and merits of the communication

4.1 By letter of 17 December 1998, the State party informed the Committee that it did not contest the admissibility of the communication. By letter of 6 April 1999 it submitted its observations on the merits.

4.2 The State party argues that the CRA did not consider, in its decision of 6 August 1998, that the risk of future persecution alleged by the author conformed with the facts. Firstly, it had not been established that the author had been a member of the MPR, as he had not produced a membership card. Moreover, assuming that he had been a member of that party, it would only have been in a minor role, as he himself had emphasized at his second hearing. That being so, it was somewhat difficult to understand why Kabila's soldiers should have felt the need to question him on the MPR's activities rather than its senior members. Lastly, the CRA had found the author's statements concerning the events of 10 May 1997 to be unconvincing. It was known that the advance guard of the AFDL did not enter the capital until 17 May 1997. The six soldiers in question could thus only have belonged to the regime still in place on that date. Therefore, insofar as it could be accepted that the event actually took place, any fear of persecution would have disappeared with the coming to power of the AFDL, Mobutu's armed forces having been disbanded in the meantime.

4.3 The State party fully endorses the CRA reasoning concerning the lack of credibility of the author's allegations. It also regards the author's statements as far from sufficient to permit the conclusion that there are serious grounds for believing, within the meaning of article 3, paragraph 1, of the Convention, that the author would be exposed to the risk of torture if the decision to return him was implemented. Finally, it submits additional observations based on article 3, paragraph 2, of the Convention.

4.4 In his communication, the author expresses his fear of being persecuted by the army or the population because of his involvement with the MPR. Fears of persecution by the population are not included among the relevant considerations to be taken into account by the Committee under article 3, paragraph 2, of the Convention. Under the above-cited article 3, paragraph 1, only persecution originating from the army, where accepted, may be recognized as relevant.

4.5 The author never claimed that he had been arrested or tortured in the past. Only on 10 May 1997 did he apparently find himself in trouble, for the first and only time, when Kabila's soldiers allegedly came to his home and questioned him. Yet, as the CRA mentions in its decision, there is no serious evidence that might lead one to think that such an event ever actually took place. Firstly, considering the minor nature of the duties which the author says he carried out for the MPR, it is hard to see what reason the AFDL soldiers might have for taking an interest in him rather than in the party's political leaders, who were certainly better informed than he on the subject of the MPR's financial resources. Secondly, on the date given by the author the AFDL troops had not yet entered the capital. In addition, even if the author's

version was accepted – thus implying that his membership of the MPR was an established fact, which is far from being the case – that would in no way constitute a basis for fear of future persecution. It is difficult to see why the author would be tortured on his return if he was not mistreated during his supposed interrogation on 10 May 1997. In order to give sufficient substance to the risk of future persecution, the author should have provided other evidence relating to the period after his escape which would support the belief that the risk of torture was likely to materialize.

4.6 This communication differs from those cases in which the Committee considered that the return of the authors to Zaire would breach article 3 of the Convention. By contrast with the communications *Mutambo v. Switzerland*[a] and *Muzonozo Paku Kisoki v. Sweden*,[b] the author of the present communication has been unable to demonstrate that he left his country because of persecution suffered in the past or that his political activities in host countries have given rise to a greater fear that he would be tortured if he were returned to his own country. Lastly, the author has not argued that his ethnic origins could expose him to the risk of torture.

4.7 Neither has it been shown that he was a member of the MPR. Notwithstanding his intention to submit his membership card, which supposedly remained at his home after his departure, it would seem that the author has made no move to recover it. Yet, according to information from the Swiss Embassy in Kinshasa, postal links with the Democratic Republic of the Congo are operating normally. Private companies such as DHL and EMS are well established in the capital and provide an effective postal service. Moreover, the author has in no way suggested that his family has been exposed to persecution by the authorities. It must thus be supposed that the author has been at liberty to contact his family with a view to recovering his MPR membership card. That said, even had the author been a member of the MPR, that would not constitute grounds for considering that the risk of torture had been sufficiently established. The former members of the MPR in the Democratic Republic of the Congo number hundreds of thousands, and the Government has taken no general measures of persecution against them. Moreover, the author has been unable to provide detailed information on the duties he performed for the MPR. In his communication, he has not even deemed fit to provide any information on the subject.

4.8 In the light of the foregoing considerations, the State party concludes that there is nothing to indicate the existence of serious grounds for fearing that the author would personally risk being exposed to torture upon returning to the Democratic Republic of the Congo.

The author's comments

5.1 By letter of 15 July 1999, the author informed the Committee that he was in custody pending his return to the Democratic Republic of the Congo. He reverts to the subject of the Swiss authorities' interpretation as to the origin of the threat to himself in his country. According to the CRA, he ought to have had no fear of persecution, since on 10 May 1997 Kabila's forces had not yet entered Kinshasa. In fact, by 10 May 1997 a number of infiltrators had already reached the capital, although officially the advance guard did not arrive until 17 May. It was soldiers of the AFDL who interrogated the author. There could be no question of his confusing them with soldiers belonging to the armed forces of President Mobutu, who held no fears for him as they knew him.

5.2 The author argues that it is now impossible for him to provide proof of his political activities. As to his MPR membership card, he points out that if communications between the Democratic Republic of

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[a] CAT/C/12/D/13/1993.

[b] CAT/C/16/D/41/1996.

the Congo and Switzerland are supposed to be functioning perfectly, which is far from likely given the state of the postal service in Kinshasa, that can only have come about very recently. He had no news of his family for months following his arrival in Switzerland precisely because of the communication problems. He eventually learned through a letter from his mother that she had left Kinshasa some nine months previously to go with his brothers to Brazzaville, owing to the difficulties she had had in Kinshasa. She informed him that, following his departure from the country, his father had been arrested, interrogated and beaten in an effort to make him reveal the author's whereabouts. The letter had remained at his residence in La Chaux-de-Fonds.

5.3 The author did in fact describe in his application for asylum the work he did for the MPR. He had been responsible for mobilizing people at the airport in connection with all travel undertaken by President Mobutu. Consequently he was well known, particularly in Kinshasa. That was the reason for his continuing fear that he would be at risk of recognition and arrest if he returned to the Democratic Republic of the Congo.

5.4 The author contends that the many former employees of President Mobutu who remain in the country without problems have preserved their freedom through payments and bribery. He states that two compatriots whom he met in Switzerland, and whose names he supplies, were arrested on their return to the Democratic Republic of the Congo and imprisoned at Makala.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee also notes that all domestic remedies have been exhausted, and considers that there is no reason why it should not declare the communication admissible. Since both the State party and the author have provided observations on the merits of the communication, the Committee proceeds with the consideration of those merits.

6.2 The issue before the Committee is whether the expulsion of the author to the Democratic Republic of the Congo would violate the State party's obligation under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

6.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture if returned to the Democratic Republic of the Congo. In reaching this decision, it must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in the country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon returning to that country; there must be other grounds indicating that he or she would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be in danger of torture in his or her specific circumstances.

6.4 In the present case it must be pointed out that the author has provided neither the Committee nor the State party with any evidence that he was a member of the MPR or that his family has been persecuted

by the current regime in Kinshasa. The Committee does not find his explanations for the absence of such evidence convincing. Nor has the author provided evidence of the alleged persecution to which former, in particular junior, members of the MPR are supposedly subject at present owing to their support for the country's former president and active backing for the opposition to the regime currently in power.

6.5 The Committee is concerned at the many reports of human rights violations, including the use of torture, in the Democratic Republic of the Congo, but recalls that for the purposes of article 3 of the Convention the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

7. The Committee against Torture, acting under article 22, paragraph 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the author to the Democratic Republic of the Congo does not constitute a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the French text being the original version.]

8. Communication No. 126/1999

Submitted by:	H.A.D. [name deleted] [represented by counsel]
Alleged victim:	The author
State party:	Switzerland
Date of communication:	21 January 1999

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 10 May 2000,

Having concluded its consideration of communication No. 126/1999, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication and the State party,

Adopts the following decision:

1.1 The author of the communication is Mr. H.A.D., a Turkish citizen of Kurdish origin born in 1962 and currently residing in Switzerland, where he applied for asylum on 11 March 1991. His application, however, was turned down and he claims that his forcible repatriation to Turkey would constitute a violation by Switzerland of article 3 of the Convention against Torture. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the communication to the attention of the State party on 8 February 1999. At the same time, the State party was requested, pursuant to article 108, paragraph 9, of the Committee's rules of procedure, not to expel the author to Turkey while his communication was under consideration. On 6 April 1999, the State party notified the Committee that steps had been taken to ensure that the author was not returned to Turkey while his case was pending before the Committee.

The facts as submitted by the author

2.1 The author comes from the south-eastern part of Turkey. His family owns a farm in the village of Bazlama, in the Karakocan region of Elazig province in south-eastern Turkey, an area traditionally inhabited by the Kurds.

2.2 When the author was living in Turkey, most of the members of his family had problems with the authorities. His older brother Y., an active supporter of the Kurdish Workers' Party (PKK) since 1979, joined the PKK fighters in 1986 and was killed during a battle on 13 February 1995. His father died on 15 January 1980, three months after surviving a month in prison, where he had been tortured. He had been arrested on account of his son Y.'s activities in the PKK. The circumstances surrounding their father's death traumatized the author's younger brother, V., an asylum-seeker in Switzerland. At the age of nine, V. was unable to talk for several months following his father's arrest by the security forces. He has been suffering since then from chronic psychological problems, for which he has needed psychiatric help, including in Switzerland. The only brother of the author to stay in Turkey had to change his surname in order to avoid further persecution. The author's wife was forced to agree to a divorce for the same reasons. Lastly, the author cites the names of several other members of his family who were refugees in Switzerland or who were killed by the Turkish army.

2.3 In 1985, the author was jailed about one month after the arrest of a cousin, N.S., who today has refugee status in Switzerland, on charges of acting as a guide (or "pathfinder"[a]) to this cousin and other guerrillas in 1984. During his detention, he was ill-treated and tortured. The doctor's observations on the medical certificate he has produced can only be interpreted as referring to the effects of the torture to which he was subjected. The author emphasizes that such observations of torture cannot be confirmed by a doctor without endangering the latter's life.[b]

2.4 Later, he took part in the 1991 spring festivities (*Newroz*), which had been moved forward to January for political reasons. The festivities came to an end when the security forces arrived. One guerrilla and two soldiers were killed. The author managed to escape undetected; he went back to Istanbul and left the country as he was afraid he would be persecuted again for taking part in the festivities.

2.5 The author applied for asylum in Switzerland on 11 March 1991. He was questioned on 15 May 1991 and 29 March 1994. The author stresses that these rounds of questioning were difficult for him

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[a] The word used in the original communication.

[b] See Vincent Iacopino, "Torture in Turkey and its unwilling accomplices", Physicians for Human Rights, 1996, pp. 4-9.

because of his lack of schooling; moreover, the fact that the second one took place three years after the first meant that his memory of events changed. His lack of education also accounts for his ignorance of various aspects of the PKK and explains why he did what he could to support this organization. The Federal Office for Refugees turned down the author's application for asylum on 1 November 1994. The author's appeal to the Swiss Appeal Commission on Asylum Matters was rejected on 6 November 1998.

Merits of the complaint

3.2 The author claims that torture is commonly used in Turkey during police interrogations, as has been confirmed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. According to the author, people committing acts of torture are protected by the 1991 Anti-Terrorist Act and by the courts and tribunals.[5] "This state of affairs will never change as long as the Turkish Republic is based on the myth of an ethnically homogeneous Turkish people, sustained *despite* all proof to the contrary by an army fighting an unwinnable war that the Turkish economy can ill afford, the cost of which has led to the corruption of the entire political class".[6]

3.2 The first argument put forward by the author is that he comes from a family with close links to the PKK and whose mere reputation could give him the most serious kinds of problems with the Turkish authorities, including torture. As emphasized in a court ruling in Stuttgart, Germany, concerning his cousin F.M., as a member of a family that has suffered deeply from persecution, the author will certainly be tortured if he returns to Turkey. The risk is real and personal since he has already been subjected to torture and the Turkish authorities rightly believe that he has helped PKK guerrillas by doing small favours for them and supporting them.

Observations by the State party on the admissibility and merits of the communication

4.1 The State party did not contest the admissibility of the communication and made observations on its merits in a letter dated 9 August 1999.

4.2 First, the State party recalls that the existence of a pattern of mass, flagrant or systematic violations of human rights in a country does not as such constitute a sufficient ground for concluding that a person would be in danger of being subjected to torture if he returned to that country. There must also be grounds for believing that the author would be personally at risk.

4.3 Furthermore, the State party does not believe the author can claim to be the victim of "deliberate persecution", defined as government reprisals against the families of political activists. Even though the author's older brother Y. was wanted for his PKK activities, there had been no contact between the two of them for over 10 years, according to the author's statements when he applied for asylum. It is therefore unlikely that the author was wanted by the Turkish authorities at the time of his flight. As the Committee has already recalled, the fear of persecution must be of a current nature at the time when the communication is under consideration.[7] Moreover, Y. was killed on 13 February 1995 and this gives the Turkish authorities even less reason to look for the author. Lastly, with the death of Y., the author no longer has any family members in Turkey who are active members of the PKK. Those who might be subjected to "deliberate persecution" are either outside Turkey or dead.

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[5] Public statement by Amnesty International on 11 March 1998.

[6] *Neue Zurcher Zeitung* No. 19/1998, p. 5.

[7] Decision No. 61/1996, *X, Y and Z v. Sweden*, 6 May 1998.

4.4 The State party does not see how the situation of his younger brother V., an asylum-seeker in Switzerland, whatever his psychological state, can have anything to do with the alleged risks of torture faced by the author. As for the brother who stayed in Turkey, while he may have changed his name to avoid persecution, it should be stressed that the author's mother, ex-wife and children also live in Turkey and have kept the same name. The State party is therefore of the view that the brother's change of name owes more to the fact that the surname D. is very widespread in Turkey than to a real fear of persecution.

4.5 With regard to the author's divorce, the State party wonders why it took place only three years after the author's departure and why it was not his wife who applied for it if the aim of the divorce was purely, according to the author's statements, to avoid her continued persecution. The State party believes the reasons for the divorce have more to do with the irreparable breakdown of the marriage, as mentioned on the separation certificate. This impression is confirmed by the author's request for publication of a notice of intent to marry, submitted in February 1999 and withdrawn a few weeks later.

4.6 The State party recalls the Committee's general comment on the implementation of article 3 of the Convention, according to which the risk of torture "must be assessed on grounds that go beyond mere theory or suspicion", even though "the risk does not have to meet the test of being highly probable". In the light of the above, the State party does not consider that the author has demonstrated that the risk of "deliberate persecution" is highly probable. Indeed, according to information provided by the Swiss embassy in Ankara, there is no political file on the author or any file in which it is stated that he has committed a crime under ordinary law; neither the local nor the national police or gendarmerie are looking for him and there are no restrictions at all on his use of a passport. Someone from his village also confirmed that the author had left over 10 years earlier and had settled in Istanbul before leaving for Switzerland.

4.7 On the question of the allegations of torture and ill-treatment suffered by the author in the past, the State party first draws attention to the factors to be taken into account according to the general comment on the implementation of article 3 of the Convention. On the basis of this, it then refers to the observations made by the Swiss authorities on the author's application for asylum and notes that the author produced two letters from a lawyer explaining his problems which contained numerous spelling and syntactical mistakes and which had been drafted in a very unprofessional way. The author argues that the lawyer was a Kurd and did not know Turkish very well, but the State party points out that Turkish is the official language in Turkey, that the laws are written in Turkish and that lawyers' training is given in Turkish. It is therefore highly unlikely that a lawyer would not know Turkish well. The State party also points out that the author makes no further mention of an accommodation document from the *Muthar* of Bazlama and a forged letter from the Karakocan public prosecutor, and this would suggest that the author no longer contests the observations by the Swiss authorities in this regard. The State party then states that no probative value can be attached to the medical report that is supposed to prove that acts of torture took place. For one thing, the report asserts that the "treatment" lasted from 23 May to 3 June 1985, whereas the author has said he was released on 29 June 1985; for another, the author's description of the torture he underwent – including blows, burns, paralysis of two fingers and electric shocks to the genitals – does not correspond to what is described in the medical report. Lastly, the State party draws attention to the contradictory statements in which the author claimed on one occasion that, after seven days in detention, he had been taken before a prosecutor who released him after his family paid a sum of money to an "Oberleutnant" (lieutenant-colonel) and, on another occasion, that he had never been taken before a prosecutor and that his uncle had paid a security to either a judge, a prosecutor, or a "Hauptmann" (captain) or an "Oberst" (colonel).

4.8 The State party also considers that, even if the author was indeed tortured, there is no satisfactory causal link between his detention and his flight from Turkey. According to previous decisions of the Committee, the foreseeable nature of the risk seems in practice to mean that a causal relationship must be established between the persecution suffered and the reasons for fleeing. In the view of the State party,

this relationship is non-existent when there is a lapse of seven years between the persecution and departure from the country, particularly since the author did not resume his political activities in the host country.

4.9 The State party has serious doubts about the author's credibility in terms of his commitment to the PKK. Although he spoke of a whole series of activities and events he had taken part in, he was unable to give any substantial information on the PKK that was not common knowledge in Turkey; the stereotypical accommodating statements made by cousins who are refugees in Switzerland, to the effect that the author was active in the PKK, do nothing to refute these observations. The State party also stresses that it is rather surprising that counsel for the author should assert in the communication that a lack of schooling is the cause of this ignorance when the author claims to have been active in this organization for over 10 years and to come from a family of political activists, including a cousin who was a founder member of the PKK. Lastly, the argument that the contradictions in the accounts given at the different hearings are the result of the three-year gap between them is unconvincing insofar as the author had the opportunity to reread the minutes of the hearings and had to sign them.

4.10 Finally, with regard to the general situation in Turkey prevailing and described by the author with the help of various supporting documents, the State party recalls that, while it should indeed be taken into account when assessing the risk, for the purposes of article 3 of the Convention, the Committee believes there must be a foreseeable, real and personal risk that the person will be tortured if he is returned to the country. The State party also stresses that it regularly reassesses the situation in Turkey and recently decided that a person could not be repatriated to the author's home province (Elazig). However, the areas of conflict are clearly defined and it is quite possible for the author to settle in another, calmer region where he will be able to fit in easily, particularly given his knowledge of Turkish and his level of education.

Comments by the author

5.1 In a letter dated 25 October 1999, the author commented on the State party's observations on the merits of the communication.

5.2 The author first of all regrets that the State party's observations focus on arguments he never intended to put forward. For example, he never claimed that his younger brother's psychological problems were proof of the risk of torture facing him if he returned to his country. The author only wished to emphasize that he came from a family with particularly close links to the PKK and which, as a result, was certainly targeted by the Turkish authorities. It is in this context that he fears, quite rightly, that he will be tortured if he returns.[1]

5.3 It seems that the State party no longer contests any of the events the members of the author's family were involved in in connection with their activities in the PKK. This proves, therefore, that the author must have been involved with the PKK in one way or another.

5.4 The author has always given the same account of his detention in 1985 and clearly bears the marks of it. Another medical report will be produced to bear this out. The inconsistencies and contradictions pointed out by the State party are minimal and do not detract from the author's credibility.

5.5 It is true that Turkey does not recognize the principle of family responsibility. However, no one disputes that the Turkish authorities resort to reprisals against family members in their fight against the

[1] See Selahattin Celik, *Die Todesmaschinerie "Türkische Konterguerilla"*, 1999, pp. 40-212.

PKK. This explains why Y.O., the author's brother-in-law, was arrested, beaten and tortured by the Turkish authorities in August 1996 to extract information from him on members of his family and, in particular, the author's situation. In this connection, the author provides a copy of the State Security Court's decision of 10 September 1996.

5.6 With regard to his contacts with his brother Y., the author emphasizes that he illegally sent him a number of items from Switzerland that would be useful in his guerrilla activities, and this is of course illegal as far as the Turkish authorities are concerned and is a further reason why the author is afraid of returning to the country. Furthermore, the State party did not faithfully transcribe the author's statements: the author in fact stated that he had not **seen** his brother for 10 years before he left, but that did not stop him from having contact with him.

5.7 The author stands by his explanation of why his brother I. changed his name, saying it would be foolish to believe that someone could so easily change his name just because it was a very common name.

5.8 With regard to the author's divorce, it is clear that the real grounds for the divorce could not be revealed to the court and the fact that he tried to become socially integrated in Switzerland, by means of a marriage that in the end did not take place, had absolutely nothing to do with his divorce in 1994. Moreover, he continues to provide for his family.

5.9 The information on the author collected by the Swiss embassy in Ankara is highly suspect. The Turkish Government is under no obligation to provide such information to the State party and it is doubtful that it would voluntarily give accurate information on a conflict taking place in the south-east of the country. This information is in no way a reliable basis for proving there is no risk.[6] Moreover, the State party has never really disputed the facts of the author's detention in 1985.

5.10 With regard to the only contradiction found in the author's accounts of his appearance before a prosecutor, he emphasizes that it involves a legal term which is difficult to translate into Turkish, that he did not know the precise meaning of that term, since he had only had seven years of schooling, and that the hearings were held in Turkish, which is not his mother tongue. Furthermore, his uncertainty over the rank of the person who received the sum of money has no bearing on the author's credibility. As to the claim that some of the documents are false, the author is convinced that they are authentic and, even supposing some of them were forgeries, that would not have been the result of a deliberate choice on his part and could even have been justified by his extreme fear of being tortured again.

5.11 The author considers the simple spelling mistakes in the lawyer's letters to be irrelevant and a relatively feeble argument. He also refutes the State party's claims that he had accepted its observations on his lack of credibility.

5.12 The author finds it inexcusable that the State party did not have a medical examination carried out in connection with the torture he had been subjected to. His injuries have indeed affected his memory and it is easy to find inconsistencies in the account of a person who has been tortured.

5.13 The author confirms that he has had only minimal schooling, and this explains why he has no place in the PKK hierarchy. However, this lack of education did not stop him from carrying out all the activities he reported to the Swiss authorities.

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[6] See Werner Spirig, *Mit verdeckten Karten/Asylrecht im Schatten der Geheimdienste*, 2nd ed., 1996, *passim*.

5.14 With regard to the State party's argument that he contradicted himself in his account of his flight from Turkey, the author gives some details of this journey, although, according to him, they are not an important aspect of the persecution he suffered.

5.15 Lastly, on the question of the possibility of his settling in another region, the author points out that, in order to return to Turkey, he would have to go through border controls. His name alone and the fact that most members of his family have fled the country will ensure that he is detained while an investigation is carried out in his home province. During that time, he will be subjected to extreme interrogation methods.

Further observations by the State party

6.1 In a letter dated 25 January 2000, the State party provided its final comments on the above observations by the author.

6.2 According to information provided to the Swiss embassy in Ankara by a contact who lives in the author's home village, the author's sister, S.O., and her husband, Y.O., were arrested in 1996 by gendarmes, but, contrary to the author's assertions, they were not tortured. In addition, it appears that, according to the same informants, Y. and S.O. spend their holidays every year in Bazlama.

Further comments by the author

7.1 By letter of 17 April 2000, the author submitted his final comments, particularly on the report by the Swiss embassy in Ankara.

7.2 The author considers that a contact's statements to the Swiss embassy in Ankara to the effect that there was no incident at the burial of N.O. are false. The State Security Court's decision of 10 September 1996 shows that the author's brother-in-law was arrested and charged with supporting an illegal organization.

7.3 The author points out that the other Swiss embassy contact in Ankara is the mayor of the village of Balzama and that he had to be somewhat cautious about imparting information since he was not sure for whom it was intended.

7.4 The author considers that the State party should on no account base itself on information to the effect that the author is not wanted, first because of the difficulty of verifying the source and secondly because the police would not refrain from arresting the author in the event of his return to Turkey for that reason. The author is convinced that he would be arrested upon his return because he based an application for asylum on pro-Kurdish activities. When the border guards conducted their inquiry, they certainly consulted the gendarmerie, who were familiar with the circumstances of his brother's and father's death.

7.5 Lastly, by letter of 11 May 2000, the author transmitted a document according to which information concerning the registration of wanted persons in not disclosed to anyone prior to their arrest apart from the police. The Turkish police thus had no reason to inform the Swiss embassy of their wish to arrest the author.

Issues and proceedings before the Committee

8.1. Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. In this case, the Committee notes that all available domestic remedies have been exhausted and that the State party has not contested its admissibility. The Committee finds therefore that the communication is admissible. The State party and the author have each made observations on the merits of the communication and the Committee therefore proceeds to examine it on its merits.

8.2. The issue before the Committee is whether the return of the author to Turkey would violate the obligation of the State party under article 3 of the Convention not to expel or return the person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

8.3. The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Turkey. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country. Other grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

8.4. The Committee recalls its general comment on the implementation of article 3, which reads:

> "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 6).

8.5. The Committee does not doubt the allegations of ill-treatment to which the author was subjected during his 28-day detention after his arrest in 1985, even though the medical reports do not substantiate the author's description of acts of torture or their effects.

8.6. However, in view of the time that has elapsed between the events described by the author, the establishment of the veracity of his claims and the present day (15 years have passed), the current risk for the author of being subjected to torture or "deliberate persecution" on being returned to Turkey does not appear to have been sufficiently well-established.

8.7. In the light of the above, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the author to Turkey would not constitute a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the French text being the original version.]

9. Communications Nos. 130/1999 and 131/1999

Submitted by:	V.X.N. and H.N. (names withheld) [represented by counsel]
Alleged victims:	The authors
State party:	Sweden
Date of communication:	15 February 1999

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 15 May 2000,

Having concluded its consideration of communications Nos. 130/1999 and 131/1999, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the authors of the communication, their counsel and the State party,

Adopts its views under article 22, paragraph 7, of the Convention.

1.1 The authors of the communications are Mr. V.X.N., born on 1 December 1959, and Mr. H.N., born on 10 November 1963, two Vietnamese nationals currently residing in Sweden where they received refugee status and permanent residence permits on 18 August 1992 and 23 August 1991 respectively. The authors claim that they risk torture if they are returned to Viet Nam and that their forced return to that country would therefore constitute a violation by Sweden of article 3 of the Convention. The authors are represented by counsel.

1.2 In view of the similarities of the two claims, the Committee decided to consider the communications together.

1.3 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted communications Nos. 130/1999 and 131/1999 to the State party on 29 April 1999. Pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, the State party was requested not to expel the authors to Viet Nam pending the consideration of their cases by the Committee. In a submission dated 27 May 1999 the State party informed the Committee that the authors would not be expelled to their country of origin while their communications were under consideration by the Committee.

The facts as presented by the authors

The case of Mr. V.X.N

2.1 The author of the first communication (No. 130/1999), Mr. V.X.N., states that he came to Sweden in 1992, recognized as a quota refugee. In 1995 the author was sentenced under Swedish law to five

years' imprisonment. According to the sentence, the author was also to be expelled from Sweden after having served his sentence. The author was released from prison on 16 January 1999 and is at present awaiting expulsion to Viet Nam.

2.2 The author states that his family, in particular his father, had been collaborating with the previous regime in Viet Nam. When the Communist regime came to power in 1975 the family's property was confiscated and they were forcibly relocated to a forest region where the living conditions were difficult. The author states that, at the beginning of 1976, he was sentenced to 12 years in prison, according to the author for not having complied with a decision that he, his parents and his siblings were to stay in the area to which they had been deported. The family instead moved back to a city in the area from which they had been deported. When the police tried to make the family return to the forest, the author's uncle was shot dead and his father was treated harshly. The author claims that he resisted the police by seizing one of the policemen's weapon, which resulted in two police officers being shot dead and four injured. The author was then arrested.

2.3 The author was allegedly first detained in a remand prison for political prisoners. After approximately two weeks the author was moved to 24 Nguyen Cong Chu Nha Trang prison where he was held in detention for eight months before any judicial proceedings took place. The author claims that, while in detention, he was severely tortured on a daily basis during the first two months. The torture allegedly included beatings with weapons and batons to his head, back and chest while his hands were tied behind his back. The author also alleges that the police threatened to execute him. For the next six months, the author was kept in solitary confinement and was allegedly forced to lie locked up in his own urine and faeces. The author's submission includes a medical certificate dated 24 March 1999 from the Unit for War and Torture Injuries in Gothenburg, which indicates that the author's account appears to be credible and that the author suffers from post-traumatic stress syndrome.

2.4 The author submits that he was then sentenced to death, but owing to his young age the sentence was commuted to 12 years in prison. After nine years' imprisonment in Dong Rang prison, which included forced labour, he eventually managed to escape and, after two years of hiding on an uninhabited island fled from Viet Nam in 1986. Together with others, he stole a boat. While they were still in Vietnamese territorial waters, the Vietnamese military attempted to prevent them from proceeding. Shots were fired on both sides and many of the fugitives were wounded. The author states that he believes that some of the soldiers were also wounded and probably killed.

2.5 The author, together with his family, eventually reached the Philippines where they stayed in a refugee camp. With the assistance of the Office of the United Nations High Commissioner for Refugees (UNHCR), the author and his family were accepted as so-called quota refugees by Sweden and received permanent residence permit in 1992.

2.6 In 1995, the Court of Appeal for Western Sweden sentenced the author to five years' imprisonment, to be followed by permanent expulsion from Sweden. The author was released from prison on 26 January 1999. On the same date, the Swedish Minister of Justice, at the request of UNHCR, decided to stay the execution of the expulsion order to allow UNHCR to pronounce on the compatibility of an expulsion with article 33.2 of the 1951 Convention relating to the Status of Refugees.

The case of Mr. H.N.

3.1 The author of the second communication (No. 131/1999), Mr. H.N., states that he came to Sweden in 1991, recognized as a quota refugee. In 1995 the author was sentenced under Swedish law to five

Complaint

4. The authors submit that, upon return to Viet Nam, they will be apprehended, tortured and sentenced to death and that their forced return to Viet Nam by Sweden would therefore constitute a violation of article 3 of the Convention.

Observations by the State party on admissibility and merits

5.1 In its submissions of 3 September 1999, the State party refers to article 22, paragraph 5 (a) of the Convention, according to which the Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been and is not being examined under another procedure of international investigation or settlement. In this context, the State party draws the attention of the Committee to the fact that UNHCR has already examined the cases of the authors. In a letter dated 16 March 1999, the UNHCR Regional Representative for the Baltic and Nordic Countries informed the Swedish Minister of Justice that an expulsion of the authors would not be a breach of article 33 of the 1951 Convention relating to the Status of Refugees.

5.2 Moreover, the State party submits that the present communication should be considered inadmissible in accordance with article 22, paragraph 2 of the Convention for being incompatible with its provisions due to the lack of the necessary substantiation of the claim. Concerning the merits, the State party contends that the present communication reveals no violation of the Convention.

5.3 With respect to the merits of the communication, the State party draws the attention of the Committee to the fact that according to the Swedish 1989 Aliens Act, an alien must not be expelled from Sweden on account of having committed a criminal offence unless certain conditions are met. Firstly, the alien must be convicted of a crime that is punishable by imprisonment. Secondly, the alien may only be expelled if he is sentenced to a punishment more severe than a fine and if (a) it may be assumed that the alien will continue criminal activity in Sweden; or (b) the offence is of such a serious character that the alien should not be allowed to remain in Sweden.

5.4 The State party further notes that special conditions apply for aliens who are considered to be refugees. Such aliens may be expelled if they have committed a particularly serious crime and public order and security would be seriously endangered if they were allowed to remain in Sweden. Pursuant to the 1989 Aliens Act, there is an absolute impediment to expelling an alien to a country where there are reasonable grounds for believing that he/she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment.

5.5 The State party confirms that the authors were granted permanent residence permits and refugee status as quota refugees in Sweden, in 1992 and 1991 respectively. In accordance with the State party's practice prevailing at the time, they were accepted as quota refugees without any detailed examination of their individual reasons for flight. The Swedish Immigration Board decided to grant asylum to the authors following an interview conducted with the authors by the local police authority.

5.6 The State party states that in April 1995 the two authors were sentenced by the District Court of Halmstad to six years' imprisonment for gross rape, committed together with two other Vietnamese nationals. The authors had previously been found guilty of crimes of violence on several occasions. Owing to the authors' refugee status, the District Court rejected the public prosecutor's request that the authors be expelled from Sweden. Both the authors and the prosecutor appealed the judgement to the Court of Appeal for Western Sweden.

years' imprisonment. The author was also to be expelled from Sweden after having served his sentence. The author was released from prison on 12 October 1998 and is at present awaiting expulsion to Viet Nam.

3.2 The author states that his father was a high ranking military officer in the South Vietnamese Army until he was murdered by the Viet Cong in 1970. The author states that in 1975, when the North Vietnamese came to power in Viet Nam, he was no longer allowed to continue his primary education as he was the son of a South Vietnamese soldier. In his early twenties, the author, together with a small group of like-minded friends, created a resistence movement to work against the Communist regime. Its activities consisted mainly in producing and putting up anti-Government posters at night.

3.3 The author alleges that he was arrested and sent to a work camp, where he and many other children of South Vietnamese military personnel had to clear minefields. According to the author, many were either killed or injured. After one month, the author managed to escape and resumed his activities with the resistance, in hiding.

3.4 In 1985, after one year in hiding, the author was again arrested. According to the author, he was tortured during interrogation. The torture included beatings with rifles on his chest until he lost consciousness. The author further alleges that rifle barrels were put into his mouth and that he was threatened with death. The torture continued for several days, until the author was taken to hospital. Despite the fact that the author was tied up with rope to his hospital bed, he managed to escape. The author's submission includes a medical certificate dated 1 April 1999 from the Unit for War and Torture injuries in Gothenburg, which states that the author's account appears credible and that the author "with great probability has been subjected to cruel and inhuman treatment and torture in his home country". Between September 1985 and August 1988, the author, together with his wife, hid in the mountains.

3.5 In August 1988 the author, his wife, their child and other compatriots managed to leave Viet Nam by boat. While still in Vietnamese territorial waters, they were intercepted by the military who attempted to prevent them from leaving the country, which resulted in shots being fired on both sides. Many of the fugitives were wounded. The author states that he believes that some of the soldiers were also wounded and probably killed.

3.6 The author and his family eventually reached the Philippines on 25 August 1988 where they stayed in a refugee camp. With the assistance of UNHCR, the author and his family were accepted as so-called quota refugees by Sweden and received permanent residence permits in 1991.

3.7 In 1995, the Court of Appeal for Western Sweden sentenced the author to five years' imprisonment, to be followed by permanent expulsion from Sweden. The author was released from prison on 12 October 1998. On 26 January 1999 the Swedish Minister of Justice, at the request of UNHCR, decided to stay the execution of the expulsion order to allow UNHCR to pronounce on the compatibility of an expulsion with article 33.2 of the 1951 Convention relating to the Statut of Refugees.

3.8 In order to support their individual submissions, both authors refer to the general human rights situation in Viet Nam, noting that Amnesty International is not allowed to work in Viet Nam and that it is therefore difficult to establish clear evidence of the extent to which torture is being used in the country. However, the view of Amnesty International is that torture by the police during detention and in prisons is common.

5.7 The Court of Appeal, after holding an oral hearing at which the authors were present together with their public defence lawyer, found that the requirements for expulsion were fulfilled. In its judgement of 15 June 1995, the Court of Appeal lowered the sentences to five years' imprisonment and ordered that the authors should be expelled from Sweden after having served their sentences. The authors appealed the judgement to the Supreme Court, which refused leave to appeal. While still serving his five-year prison sentence, Mr. V.X.N. was found guilty of assault, gross assault and rape. Mr. H.N. was similarly found guilty of complicity in rape.

5.8 In December 1998, the Vietnamese Embassy in Stockholm informed the Ministry for Foreign Affairs that the Ministry of Public Security of Viet Nam had accepted the repatriation of the authors.

5.9 Following a petition from UNHCR in January 1999, the Minister of Justice stayed the enforcement of the expulsion order, awaiting the advice of UNHCR Regional Representative for the Baltic and Nordic Countries as to the compatibility of the expulsion with article 33, paragraph 2, of the 1951 Convention relating to the Status of Refugees, in accordance with which the protection against "refoulement" can not be claimed "by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." On 16 March 1999, UNHCR informed the Minister of Justice that the decision to expel the authors did not violate the 1951 Refugee Convention.

5.10 The State party further informs the Committee that since January 1999, Mr. V.X.N. has three times requested the Government to cancel the expulsion order, or to grant him a temporary residence permit. At the time of the State party's submission, two requests had been denied, and the third was pending. Since January 1998, Mr. H.N. has made six similar requests to the Government. At the time of the State party's submission, five requests had been turned down while the sixth was still pending.

5.11 The State party underlines that when determining whether the forced return of the authors to Viet Nam would constitute a breach of article 3 of the Convention, the following considerations are relevant: (a) the general situation of human rights in Viet Nam and (b) the personal risk of the authors of being subjected to torture if returned to Viet Nam.

5.12 The State party submits that when the Court of Appeal found, on 15 June 1995, that no impediments existed to expulsion of the authors, account was taken of the opinion of the Swedish Immigration Board that no obstacles of a general character existed to expelling persons who had fled Viet Nam. As for impediments of an individual character, the Board had found that the scanty information available regarding the authors' personal circumstances did not indicate that there was any impediment of such kind. In addition, on 21 May 1999 and 1 June 1999, the authors were interviewed by the Board at the request of the Ministry of Justice but no impediments to expulsion were identified as a result.

5.13 As to the general situation of human rights in Viet Nam today, the State party submits that according to various reports from international and other sources, such as Amnesty International, the United States Department of State and the Swedish Embassy in Hanoi, measurable improvements have been made in a few areas, although serious problems remain, particularly as to the enjoyment of the freedom of speech, assembly, association and religion. Arbitrary arrests and detentions occur quite frequently and prison conditions are harsh, but reports of torture of detainees are rare. Although there are reports of police brutality, there is no evidence that torture is practised regularly nor that prisoners are tortured.

5.14 The State party further submits that illegal departure from Viet Nam in the middle of the 1980s is no longer considered to be a criminal offence. The majority of the people who departed illegally at that time have now returned with the assistance of UNHCR. A large number of returnees come from the same

part of Viet Nam as the authors. Among those who have been repatriated involuntarily, some have served prison sentences for crimes committed in countries of first asylum, but according to UNHCR there are no reports of retribution or discrimination after their return. The State party further underlines that the majority of the approximately 500 returnees who have faced legal action upon return on charges of crimes committed before departure from Viet Nam have been sentenced for crimes of violence and none for political crimes. UNHCR has been able to visit all of them in private. Finally, the State party points out that several children of former leaders of the South Vietnamese Army travel between Sweden and Viet Nam without encountering any difficulties with the Vietnamese authorities.

5.15 As for the assessment of the individual risks of the authors of being subjected to torture, the State party recalls that according to the jurisprudence of the Committee this risk must be foreseeable, real and personal, and submits the following.

The case of Mr. V.X.N.

6.1 The State party recalls that the author has invoked three different reasons why he would be exposed to a risk of torture if expelled to his country of origin. He maintains that he would be apprehended and tortured by the Government or some governmental agency for having escaped from prison, where he was serving a 12-year sentence for having killed two policemen and injured four. Secondly, some of the pursuing soldiers may have been injured or shot to death when the author and others escaped Viet Nam by boat. Thirdly, the author has also stated that he has received death threats from the owner of the boat which he stole in order to escape. The State party draws the Committee's attention to the fact that the author of the present communication has not belonged to any political organisation, nor has he been politically active in his home country.

6.2 The State party submits that during the examination of the author's case, contradictions, inconsistencies and peculiarities concerning essential points raised serious doubts as to the credibility of the author's claims. Firstly, it seems that the author did not raise the subject of torture until he submitted his complaint to the Committee at the beginning of 1999. During the interview conducted with him by the local police authority in 1992, the author did not, according to the State party, mention that he had previously been ill-treated or tortured nor that he feared being tortured upon return. Similarly, no mention of torture was made during the proceedings before the District Court and the Court of Appeal, in his request to the Supreme Court for leave to appeal, or in his request to the Government in January 1999 to quash the expulsion order.

6.3 Although noting the medical certificate submitted by the author to support his claim, the State party points to inconsistencies as regards the author's account of the nature and extent of his alleged previous torture. During the medical examination of March 1999, the author stated that he had been in custody for eight months and was tortured on a daily basis during the first two months. In the interview held by the Swedish Immigration Board on 21 May 1999, the author stated that he was tortured daily during one month and thereafter three times a week. Finally, during the last interview held by the Board on 1 June 1999, the author stated that he was in custody for six months and tortured almost every day. In addition, the author's description of the alleged torture has become increasingly dramatic during the proceedings. Initially the author only mentioned that he had been kicked and beaten, while in the last interview he mentions for the first time electric shocks and having been forced to drink water mixed with detergent.

6.4 The State party draws the Committee's attention to the fact that during the initial local police interview in 1992, the author did not mention that he had been sentenced to 12 years' imprisonment, nor that he had escaped from prison. His account at that time was that he had tried to escape from Viet Nam in March 1981 but failed in his attempt and was sentenced to three years' imprisonment, a sentence which he served. According to the records of 1992, the author claimed that he again tried to leave the country

in October 1984 but was sentenced to prison for two years and ten days upon discovery. In his petition to the Government submitted in January 1999 he stated that he had been sentenced to 12 years' imprisonment because he had run away from the place in the jungle to which his family had been forcibly moved and had participated in the organization of a group which aim was to help others who were still left in the jungle to escape. He then claimed that he was caught together with four others, three of whom were sentenced to death and one to 17 years in prison. It is also noted by the State party that the author has provided no evidence to substantiate his claim that he was sentenced to 12 years' imprisonment.

6.5 The State party also refers to other peculiarities and inconsistencies, such as the fact that if the author's most recent account is true, his three eldest children must have been conceived in prison, and that it is unlikely that any uninhabited islands are to be found in the area where the author claims to have hidden after his escape from prison. The State party maintains that these inconsistencies are reasons to doubt the credibility and veracity of the first claim of the author, based on his alleged past experience of torture and escape from prison.

6.6 With reference to the inconsistencies mentioned, the State party submits that all three interviews held with the author were conducted in the presence of a Vietnamese interpreter and that the author stated that he understood the interpreter well.

6.7 With reference to the author's flight from Viet Nam, the State party draws the attention of the Committee to the fact that the author has only mentioned pursuing soldiers having been injured or killed in his submission to the Committee and in his request to the Government for leave to appeal, and that no information to this effect was given during the initial police interview, the judicial proceedings or during the interview conducted by the Swedish Immigration Board in May 1999. The State party submits that this indicates that the author does not attach any particular importance to the circumstance and that he does not fear that it will entail any serious consequences for him, particularly as it has not been asserted that the author himself is, or is suspected of being, personally responsible for the shooting. Furthermore, it is submitted that accounts of shootings in connection with escapes from Viet Nam in the 1980s are common but that in no case has it been possible to verify this information.

6.8 As regards the risk of the author being ill-treated by a private person, i.e. the owner of the boat which the author stole in order to escape, the State party recalls the definition of torture as contained in article 1 of the Convention, as well as the Committee's views regarding the case of *G.R.B. v. Sweden* (communication No. 83/1997) adopted on 15 May 1998. The State party submits that the risk of ill-treatment by a private person, without the consent or acquiescence of the Government of the country to which expulsion is to take place, falls outside the scope of article 3 of the Convention.

6.9 The State party submits that, according to the Swedish Embassy in Hanoi, there is no indication that the author is of any particular interest to the Vietnamese authorities at present. No evidence has been brought forward by the author to support the claim that he is wanted by the police after his escape from Viet Nam. Reiterating its doubts as to the veracity of the author's claim, the State party submits that even if this information was to be considered as credible and if it was assumed that the author would in fact be detained and imprisoned upon his return, the risk of detention and imprisonment as such is not sufficient to prompt the absolute protection provided for in article 3 of the Convention. In this context, the State party recalls that there is little evidence that torture is practised in Viet Nam.

6.10 Finally, the State party informs the Committee that one of the Vietnamese nationals who were convicted of gross rape in the same trial as the author was expelled to Viet Nam in April 1998. Although the expelled person claimed that he had left the country illegally and had committed a crime in connection with his escape, the information received by the State party regarding his current situation does not indicate that he has been treated badly by the Vietnamese authorities since his return.

7.1 The State party recalls that the author has invoked three different reasons why he would be exposed to a risk of being subjected to torture if expelled to his country of origin. He maintains that he would be apprehended and tortured by the Government or some governmental agency for having run away from the mine clearance work that he was forced to perform. Secondly, the author claims that he belonged to a resistance movement and was suspected of carrying out hostile activities against the Government, such as putting up posters. Finally, the authors fears reprisals for having killed several policemen in connection with his escape from Viet Nam. Some of the pursuing soldiers may have been injured or shot to death when the author and others escaped Viet Nam by boat.

7.2 The State party notes that the author has alleged that he was apprehended and subjected to torture in 1985. According to the medical certificate issued after an examination of the author by a psychiatrist in April 1999, it is very likely that the author was subjected to cruel and inhuman treatment and torture in his country. However, the State party draws the attention of the Committee to the fact that no mention is made of the author suffering from a post-traumatic stress disorder, nor is there any reference to physical signs of torture.

7.3 The State party submits that during the examination of the author's case, contradictions and inconsistencies concerning essential points raised serious doubts as to the credibility of the author's claims. The Committee's attention is drawn to the fact that the author, when interviewed by the police authorities in 1991, did not mention that he had been apprehended and tortured in Viet Nam. Nor did the author bring up the subject of torture during the proceedings in the District Court, the Court of Appeal or in his request to the Supreme Court for leave to appeal. Not until January 1998, in his petition to the Government, did the author claim that he had previously been tortured and that he feared imprisonment if expelled.

7.4 Further, the State party points out that the author has given the following different versions as to why he was apprehended and tortured by the police in 1985: (a) in his petition to the Government in January 1998 he stated that he was discovered when planning his escape from Viet Nam; (b) according to the medical report of April 1999, he was interrogated and tortured to reveal the names of his comrades in the resistance movement; (c) during the interview before the Swedish Immigration Board in May 1999, the author claimed that he was apprehended for carrying arms and evading mine clearance duty; (d) during the interview before the Board in June 1999, the author stated that he was suspected of revolutionary activities and of putting up posters; and (e) in the author's complaint to the Committee, he invokes his escape from mine clearance duty as the reason for having been tortured.

7.5 The State party draws the attention of the Committee to the fact that, when interviewed by the police in 1991, the author mentioned that he had been forced to perform hard work in a place where there were mines, but made no mention of having evaded mine clearance duty. When interviewed in June 1999, the author stated that he risked being tortured upon return to Viet Nam for having shot policemen and for being an opponent of the regime. In view of the fact that the author did not expressly refer to the escape from mine clearance duty as a reason why he would be in danger of being tortured, the State party concludes that the author himself does not fear that this circumstance will entail any serious consequences for him. In addition, the State party submits that there is no information indicating that such an act would be considered a punishable offence in Viet Nam today, let alone be punished with imprisonment.

7.6 With reference to the author's claim to have engaged in activities within the resistance movement, the State party points out that during the initial interview, in 1991, the author did not make any such claim; nor were political activities expressly mentioned in the author's communication to the Committee, they were only mentioned in the medical certificate issued in April 1999. The records of the medical

examination further indicate that the author claimed to have been "organized" in the resistance movement and was apprehended for hostile activities against the Government and put in a labour camp. After having escaped he allegedly again joined the resistance, after which he was apprehended and tortured. However, the State party points out that during the interview before the Swedish Immigration Board in May 1999, the author submitted that he was "the founder" of the resistance movement which consisted of five members.

7.7 Apart from the above inconsistencies, the State party points out that the author himself has stated before the Board that if the Vietnamese authorities had known anything about the resistance movement, the author would have been executed. According to the State party, this clearly indicates that the movement was unknown to the authorities. In addition, the State party submits that according to information from UNHCR and human rights organisations in the area of Nha Trang, no armed resistance movement or any resistance group devoting itself to putting up posters in the city has ever been heard of. It is also emphasized that the Vietnamese authorities would not at present have an interest in punishing a person for writing and putting up anti-governmental posters about 15 years ago.

7.8 With reference to the author's escape from Viet Nam, the State party draws the attention of the Committee to the fact that during the initial police interview, in 1991, the author did not mention that he had fired at policemen in connection with his escape. Not until July 1998, in his petition to the Government, and in subsequent interviews, did the author indicate that he had shot and killed one or several policemen. The State party underlines that according to the author, there were a large number of people on the boat and the escape, which took place from a big city, was tumultuous. In such circumstances, it would, according to the State party, be surprising if the police were able to identify a perpetrator. Further, the State party draws the attention of the Committee to the fact that the author has not asserted he is being sought by the police in connection with the alleged killings and that there is no indication that the police have issued a warrant for his arrest.

7.9 The State party also submits that the author has given inconsistent and contradictory information *inter alia* regarding his family in Viet Nam and whether or not his wife was with him when he was hiding from the authorities between 1985 and 1988.

7.10 With reference to the inconsistencies mentioned, the State party submits that all three interviews with the author were conducted in the presence of a Vietnamese interpreter. The State party acknowledges that during the last interview before the Board, held in June 1999, the author stated that the interpreter spoke a different dialect and that there were certain things he had not understood, without specifying what. However, the State party underlines that the interpreter had no difficulties understanding the author and that it has been informed that speakers of different Vietnamese dialects can easily understand each other.

7.11 The State party submits that according to the Swedish Embassy in Hanoi, there is no indication that the author is of any particular interest of the Vietnamese authorities today. No evidence has been brought forward by the author to support the claim that he is wanted by the police following his escape from Viet Nam. Reiterating its doubts as to the veracity of the author's claim, the State party submits that even if this information were credible, it would not be sufficient to prompt the absolute protection provided for in article 3 of the Convention (see para. 6.9 above).

7.12 Finally, the State party refers to the case of another Vietnamese national, convicted of gross rape in the same trial as the author and expelled to Viet Nam in April 1998 (see para. 6.10 above).

Additional observations by the State party

8.1 In its supplementary submissions dated 5 and 19 October 1999, the State party draws the attention of the Committee to a letter from the Ministry of Public Security of Viet Nam to the Swedish Embassy in Hanoi, stating that neither of the authors have any criminal record in Viet Nam.

8.2 It is further submitted that the second of the Vietnamese nationals expelled to his country of origin after servicing a prison sentence in Sweden for a crime committed together with the authors has addressed a petition to the Government of Sweden to be reunited with his family in Sweden. The State party informs the Committee that before his expulsion, this Vietnamese national claimed that he was suspected of stealing a police boat and murdering two policemen in connection with his escape from Viet Nam. He also maintained that he had previously been imprisoned three times in Viet Nam and that he had been tortured. The State party draws the attention of the Committee to the fact that in his new petition, made more than a year after his return to Viet Nam, there is no indication that he has been of interest to the Vietnamese authorities since his return.

Counsel's comments

9.1 Counsel dismisses the State party's argument that the authors' communications should be considered inadmissible in accordance with article 22, paragraph 5 (a) of the Convention. It is submitted that there is no UNHCR procedure of international investigation or settlement provided for by the 1951 Refugee Convention. In addition, the issue considered by the UNHCR Regional Representative for the Baltic and Nordic Countries was the compatibility of the expulsion decision with article 33 of the 1951 Refugee Convention and not the question which is pending before the Committee, i.e. whether the authors' face a risk of torture upon return to Viet Nam.

9.2 Counsel informs the Committee that although the Ministry of Public Security of Viet Nam accepted the repatriation of the authors in December 1998, Viet Nam had a few months earlier refused such repatriation. According to a Swedish newspaper, the reason for the refusal was said to that the authors were accused of committing serious crimes in Viet Nam prior to their escape.

9.3 With reference to the interviews conducted with the authors by the Swedish Immigration Board in May and June 1999, counsel draws the attention of the Committee to the fact that these took place after the submission of the authors' communications to the Committee, and only after the submission of a request by counsel to the Ministry of Justice, stating that "the written opinion of the Swedish Immigration Board which was the basis of the Court of Appeal's decision to expel [the authors], contains only general statements".

9.4 Counsel recalls that when the authors were initially interviewed by the police, in 1992 and 1991 respectively, they were already accepted as quota refugees and did not applied for asylum under the same circumstances as normal asylum-seekers arriving in Sweden. During the interviews no questions were asked about previous torture and ill-treatment in Viet Nam, nor were the authors asked about the risks they would face should they be returned.

9.5 In the case of the first author, Mr. V.X.N., counsel submits that the subject of past or future risk of torture was never brought up during the criminal proceedings, either by the courts, or by the author's defence counsel and the author therefore did not know that the issue would be of any significance. In Mr. H.N.'s case, counsel submits that the author's defence brought the issue to the attention of the District Court. However, in the District Court's decision not to expel the authors, reference was only made to the fact that, even though conditions in Viet Nam had recently improved considerably, it could not be

maintained that the defendants were no longer refugees. The issue of fear of future torture was not brought up by the defence counsel before the Court of Appeal, as the defence counsel, in view of the decision made by the District Court, did not believe that the Court of Appeal would agree to expulsion.

9.6 Counsel further draws the attention of the Committee to the fact that, although a Vietnamese interpreter was present during all interviews with the authors, it is claimed by the authors that there is a considerable difference between the dialects of the north and those of the south of Viet Nam. The interpreters used by the Swedish Immigration Board are normally from the north, whereas the authors are from the south. According to counsel, this circumstance explains some of the inconsistencies referred to by the State party.

9.7 In response to the State party's argument that the numerous accounts of shootings in connection with escapes from Viet Nam in the 1980s have in no case been possible to verify, counsel submits that this is logical. He submits that Vietnamese nationals already repatriated would have no interest in having this information confirmed and that it would be inappropriate for UNHCR to investigate and search for evidence against the very people they are assisting.

9.8 Counsel emphasizes that the reference of the State party in its initial observations and its supplementary comments dated 19 October 1999 to the cases of two other Vietnamese nationals who have been returned to Viet Nam should not be taken into account by the Committee, as every individual claim should be examined on its own merits.

9.9 Apart from counsel's comments applicable to both authors, he submits the following regarding the merits of the respective cases.

The case of V.X.N.

10.1 Counsel argues that in its assessment of the risks faced by the author, the State party neglects to attach due importance to the result of the medical examination. The description of the physical sufferings of the author indicates that the inconsistencies referred to by the State party to raise doubts as to the author's credibility are to be expected from a person who tries to recount his experiences of torture.

10.2 Counsel notes the State party's argument that the author has not provided any evidence, i.e. a judgement that he was in fact sentenced to 12 years' imprisonment and that it refers to certain "peculiarities" in relation to the author's stay in and escape from prison. Counsel submits that the judgement in Viet Nam was never transmitted directly to the author, but only to his defence counsel at the time, whose name he does not remember after 23 years. However, the author has given details about the trial itself, i.e. that it took place in the city of Nha Trang and that the investigation was done by the Khanh Hoa county authorities.

10.3 As to the "peculiarities" referred to by the State party, counsel submits that there is no reason to doubt the author's affirmation that his three eldest children were in fact conceived during the author's imprisonment. Prison guards could be bribed to leave prisoners and their visiting wives alone for some privacy, although it was formally forbidden. As to the unlikelihood to find any uninhabited islands in the area where the author claims to have hidden after his escape from prison, the existence of the thinly populated Vung Me island, outside Nha Trang, where the author hid can easily be confirmed.

10.4 Counsel further submits that the statements regarding prison sentencing attributed to the author during his initial interview in 1992 are the result of misunderstandings due to the fact that the author, after

his sentencing in 1976, served the time until his escape nine years later in three different prisons. Counsel maintains that no other inconsistencies relating to the author's account of torture, sentencing, imprisonment and escape from prison are of substantial value, and should be seen in the light of the considerable time which has elapsed since the events took place.

10.5 Counsel further states that the protection provided for in article 3 of the Convention does not only apply to the risk of being subjected to torture by the Vietnamese State authorities, but also if the authorities are not able to provide the individual with necessary protection against criminal actions in Viet Nam. Counsel refers in this context to the jurisprudence of the European Court of Human Rights.

10.6 Finally, counsel refers to the State party's supplementary observations of 5 October 1999, stating that the information provided by the Vietnamese authorities as to the author's criminal record is incorrect and maintaining that the author was sentenced by a court in Nha Trang in 1976 to 12 years' imprisonment.

The case of Mr. H.N.

11.1 Counsel submits that the inconsistencies referred to by the State party with regard to the information provided by the author are not of substantial character but are merely a matter of semantics. The inconsistencies can be explained simply, by the fact that different interpreters were used during the different interviews or that the author's statements may have been written down differently on different occasions. As an example, counsel notes the State party's argument that the author's petition to the Government in January 1998, in which he stated that he was discovered when planning his escape from Viet Nam and was thereafter apprehended and tortured, diminishes the credibility of the author. In this respect, counsel submits that this statement in no way contradicts the author's claim that he was of interest to the authorities for having escaped mine clearance duty or for having been active in the resistence, or for a combination of the two.

11.2 With reference to the author's activities in the resistance, counsel disputes that individuals from different human rights organisations and from UNHCR referred to by the State party would necessarily have any knowledge about the activities of a small anti-Communist resistance group operative in Nha Trang 14 years ago.

11.3 Counsel disputes the indication by the State party that the author's account of his escape and the shootings in connection with it has been "escalating". Counsel argues that rather it is the questioning during the various interviews which escalated and recalls that during the initial police interview, in 1991, the author was not asked in detail about his escape. Counsel further disputes the State party's assertion that there is no indication that an arrest warrant for the author has been issued, and reminds the Committee of the initial refusal by the Vietnamese authorities to accept the repatriation of the authors because they had committed crimes in Viet Nam prior to their escape.

11.4 Counsel submits that it would not be possible for the author to submit any evidence other than a medical certificate to support his claim, given the circumstances of his escape. Counsel argues that it would not seem appropriate for the author to contact the Vietnamese authorities requesting documentary evidence and that the police, for obvious reasons, does not supply written evidence that torture has occurred.

11.5 Finally, counsel refers to the State party's supplementary observations of 5 October 1999, in which it is stated that the author has no criminal record in Viet Nam, submitting that this is in accordance with the author's statements that he has not been sentenced by a Vietnamese court for any crime.

Further comments by the State party

12.1 In its complementary submission dated 8 February 2000, the State party states that there was never any refusal on the part of Viet Nam to accept the repatriation of the authors. The State party adds that for many years it has been faced with difficulties when trying to repatriate Vietnamese citizens, and that the acceptance of the Vietnamese authorities in this respect was a result of lengthy discussions between the two countries concerned regarding a large number of repatriation cases.

12.2 The State party states that the Swedish Embassy in Hanoi has confirmed that although the Vietnamese language has different dialects, with differences in pronunciation and sometimes vocabulary, these differences are not significant. The State party further points out that the written language is the same in all parts of the country.

12.3 Finally, with reference to Mr. V.X.N.'s claim that he would risk ill-treatment by a private person, the State party wishes to underline that no evidence has been brought forward to suggest that the Vietnamese authorities would be incapable of affording the author appropriate protection against such treatment. The State party states that the jurisprudence mentioned by counsel in this respects concerns solely the interpretation of the European Convention on Human Rights and is not applicable to the Convention against Torture.

Issues and proceedings before the Committee

13.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. With reference to article 22, paragraph 5 (a), of the Convention, the Committee takes note of the State party's view that the cases of the authors have already been examined by UNHCR to ascertain whether or not an expulsion would be compatible with the State party's obligations under article 33.2 of the 1951 Refugee Convention. The Committee notes, however, that neither the 1951 Refugee Convention nor the Statute of UNHCR provides for the establishment of a procedure of international investigation or settlement. The Committee considers that a written opinion or advice given by a regional or international body on a matter of interpretation of international law in relation to a particular case does not imply that the matter has been subject to international investigation or settlement.

13.2 The Committee is further of the opinion that all domestic remedies have been exhausted and finds that no further obstacles to the admissibility of the communications exist. Since both the State party and the authors' counsel have provided observations on the merits of the communications, the Committee proceeds with the consideration of those merits.

13.3 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the authors would be in danger of being subjected to torture upon return to Viet Nam. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individuals concerned would be personally at risk of being subjected to torture in the country to which they would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his/her return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights

does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

13.4 The Committee recalls the absolute character of the obligation of State parties contained in article 3, paragraph 1, of the Convention. In this connection the Committee notes that pursuant to the Swedish 1989 Aliens Act there is an absolute impediment to expulsion an alien to a country where there are reasonable grounds for believing that he/she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment.

13.5 The Committee notes that the decision by the Court of Appeal to expel the authors was taken on the basis of what the Swedish Immigration Board characterized as "scanty" available information regarding the authors' personal circumstances. It is further noted that the complementary interviews with the authors, conducted to provide a basis for a risk assessment, were not conducted until after the submission of the authors' communications to the Committee and only upon request from counsel to the Ministry of Justice.

13.6 Having noted the above, the Committee considers that the authors' activities in Viet Nam and their history of detention and torture are relevant in determining whether they would be in danger of being subjected to torture upon their return. The Committee notes in that respect that the State party has pointed to inconsistencies in the authors' accounts of events and has contested the general veracity of their claim. In the present case, although a number of disparities may be explained by difficulties in translation, the considerable time which has elapsed since the authors' escape from Viet Nam and the procedural circumstances, the Committee considers that some doubts as to the authors' credibility remain.

13.7 Notwithstanding the above, the Committee is aware of the human rights situation in Viet Nam, but considers that given, *inter alia*, the considerable time which has elapsed since the escape of the authors and the fact that the illegal departure from Viet Nam in the middle of the 1980s is no longer considered an offence by the Vietnamese authorities, the authors have not substantiated their claims that they will personally be at risk of being subjected to torture if returned to Viet Nam at present. In this connection the Committee notes that a risk of being imprisoned upon return as such is not sufficient to trigger the protection of article 3 of the Convention.

13.8 The Committee recalls that, for the purposes of the Convention, one of the prerequisites for "torture" is that it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Committee considers that the issue whether a State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a private person, without the consent or acquiescence of the State, falls outside the scope of article 3 of the Convention.

14. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the English text being the original version.]

10. Communication No. 137/1999

Submitted by:	G.T. (name deleted) [represented by counsel]
Alleged victims:	The author
State party:	Switzerland
Date of communication:	27 May 1999

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 16 November 1999,

Having concluded its consideration of communication No. 137/1999, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication and the State party,

Adopts the following decision:

1.1 The author of the communication is Mr. G.T., a Turkish citizen of Kurdish origin born in 1975 and currently residing in Switzerland, where he has applied for asylum. His application has been rejected and he alleges that his forced repatriation to Turkey would constitute a violation by Switzerland of article 3 of the Convention against Torture. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 18 June 1999. At the same time, the Committee, acting in accordance with rule 108, paragraph 9, of its rules of procedure, requested the State party not to expel the author to Turkey while his communication was being considered. On 18 October 1999, the State party notified the Committee that measures had been taken to prevent the author from being returned to Turkey while his communication was pending before the Committee.

The facts as submitted by the author

2.1 The author comes from south-eastern Turkey; he was born on 25 November 1975 in Dogan Köy, a village near Erzincan, and lived there until 1993. He states that at that time villagers were subjected to torture by the Turkish army and that young people were systematically arrested on suspicion of being partisans, resistance fighters or guerrillas, and tortured, especially in the village of Dogan Köy, which, according to the author, was notorious for its links with the Kurdistan Workers' Party (PKK).

2.2 The author and his parents left this village when he was young to settle in Istanbul. As a student, he was very active in politics. As a supporter of the Youth Union of Kurdistan (YCK), the youth branch of the PKK, until 1992, the author took part in demonstrations, meetings and the distribution of pamphlets. He also collected money for the cause and helped to recruit new supporters.

2.3 On 29 May 1995, when he was about to be called up, the author left Turkey to join his brother, a Swiss citizen, in Switzerland. His departure was also prompted by his fear of having to do his military service. He submitted an application for asylum on 27 July 1995, but it was turned down on 3 November of the same year. On 29 April 1999, the Swiss Appeal Commission on Asylum Matters, in its ruling on his appeal, confirmed the initial decision to refuse asylum.

2.4 The author alleges that, since he settled in Switzerland, the police have made several visits to his parents' home in Istanbul because he was an active opponent of the Government and a deserter. After several visits, his parents were pressured into admitting to the police that the author had taken refuge in Switzerland and had applied for asylum there. As a result, the Turkish consulate in Geneva twice summoned his brother to the consulate so that the author could clarify his situation in Switzerland and the problem of his military service. The author made no response.

2.5 In addition to the facts noted above, the author cites problems that members of his family have had and that could be prejudicial to him if he returns. In this connection, he claims that two female and two male cousins who lived in his home village and who were politically active in the PKK guerrilla movement were killed in clashes with the Turkish army. The face of one of the two girls had been so badly disfigured that she could only be identified by a gold tooth.

Merits of the complaint

3.1 The author maintains that his forcible return to Turkey would constitute a violation by Switzerland of its obligations under the Convention since, in view of the reasons which prompted his departure from Turkey, there were substantial grounds for believing that he would be at risk of being tortured.

3.2 After giving a brief history of the Kurdish issue, the author stresses that torture is institutionalized in Turkey and that, according to Amnesty International, almost all of the 250,000 or so people arrested between 1980 and 1988 for political reasons were tortured. The author also recalls that, according to Amnesty International, 2,500 people were killed in 1996 alone, a year during which the state of emergency was in place without interruption. During a state of emergency, a person can be held in police custody for up to 10 days, including 4 days incommunicado. It is generally accepted that to hold a person incommunicado in this way is conducive to acts of torture. For example, a certain C.S., after deserting during his military service, has said he was subjected to extremely brutal treatment, such as having a truncheon inserted in his anus and receiving electrical shocks to the genitals.

3.3 Again according to Amnesty International, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment said in its second public statement on Turkey that torture was still widespread in the country and that new instruments of torture had been found in 1992 at police headquarters in Diyarbakir and Ankara, including one instrument for giving electric shocks and another for hanging a person up by the arms. Amnesty International also mentions the finding by the European Court of Human Rights that Turkish security forces were guilty of burning houses in a village in south-eastern Turkey.

3.4 With regard to military service, the author notes that, according to Amnesty International, Turkey does not recognize the right of conscientious objection and that there is no provision for alternative civilian

service. Moreover, according to Denise Graf, cited by the author as one of the most knowledgeable people with respect to the situation of draft-evaders and those refusing to perform their military service in Turkey, Turkish soldiers of Kurdish origin are regularly sent to the provinces where a state of emergency has been declared. There is a real danger that soldiers of Kurdish origin who have to perform their military service in these regions will be subjected to ill-treatment, especially if they themselves, or a member of their family, have engaged in political activities.

3.5 The author believes that if he was sent back to Turkey he would be immediately arrested at Ankara airport and would have to admit he had applied for asylum in Switzerland for the various reasons described above. He would then be enlisted in the army and sent to the region he came from, where he would be subjected to ill-treatment and where he would have to inflict abuses on his own people. During his military service he would be tried for desertion and would have a sentence to serve at the end of his military service; he would be subjected to further ill-treatment while serving that sentence.

State party's observations on the admissibility and merits of the communication

4.1 The State party has not contested the admissibility of the communication and made its observations on the merits of the communication in a letter dated 20 December 1999.

4.2 The State party recalls that the Swiss Appeal Commission on Asylum Matters carried out a detailed examination of the author's allegations concerning the risk of persecution he would face if he ever returned to Turkey.

4.3 With regard to the risks linked to his desertion, the above-mentioned Commission noted first of all that the State party's asylum laws do not allow a person to be granted refugee status solely on the basis of an aversion to military service or fear of combat. It must also be proven either that the punishment for draft evasion or desertion is totally disproportionate on grounds that would be a determining factor in asylum cases or that the deserter would be persecuted on the same grounds – in this case, for example, if the Turkish Government were to be conscripting certain groups of the population on the basis of political or similar criteria. According to the information available to the Commission, this is not the case in Turkey, where conscription is based solely on the conscript's nationality and birth. The Kurdish origins of the author would therefore not pose any risk of his being sent to the eastern front. Furthermore, the Commission noted that the author had produced no evidence that he was being sought by the Turkish authorities for that reason. The Commission recalls that it was only because he was asked when he made his application for asylum whether he had had any problems with the army that the author mentioned his refusal to do military service, while until then he had asserted that he had no other reasons for seeking asylum. At the time, moreover, the author was very evasive on the questions put to him with regard to his military service, which showed that he knew nothing of the recruitment procedure. Given the consequences of the act of desertion, this fact raises serious doubts about the truthfulness of the author's claims in this respect. Lastly, the Swiss Appeal Commission on Asylum Matters noted that, according to its information, sentences imposed on those refusing to perform their military service in Turkey were not disproportionate.

4.4 With regard to the author's political activities, the State party emphasizes that the same Commission found that there was insufficient evidence to support his statements, that he had never been arrested or charged for draft evasion and that he had already stated that he had left his country for the sole reason that he did not wish to serve in the Turkish army.

4.5 On the more general subject of persecution because of his Kurdish origins, the Swiss Appeal Commission on Asylum Matters noted that the author lived in western Turkey (Bursa and, later, Istanbul),

where these problems were not very serious, or, at least, not more serious for the author than they were for the rest of the Kurdish population in that region.

4.6 In the context of article 3 of the Convention, the State party recalls that the risk of torture should be evaluated not only in the light of the general human rights situation in the country concerned but also in the light of factors relating to the author's own personality. The State party therefore stresses that there must be foreseeable, real and personal risk that the author will be tortured in the country to which he is returned.

4.7 The State party recalls that during its consideration of other communications from Turkish citizens, the Committee had stressed that the human rights situation in Turkey was disturbing, particularly for PKK militants, who were frequently tortured.[3] However, in the cases where the Committee found there had been a violation of article 3 of the Convention, it had previously noted that the authors were politically active within the PKK or had been detained and tortured before their departure, or else that they had additional evidence to support their allegations. On the other hand, in the cases where the Committee had not found any violation, it had concluded that no legal action had ever been taken against the author for specific incidents or that legal action had not been taken against him but against members of his family, or else that after leaving Turkey, the author, or members of his family, had not been either intimidated or wanted by the police and had stopped collaborating with the PKK.

4.8 In the case in point, the State party first draws attention to earlier decisions of the Committee, according to which the risk of arrest is not on its own and in itself evidence of a risk of torture. The author must also prove that the act of desertion and his political activities give rise to a real risk of torture if he returns.

4.9 The State party emphasizes the length of time taken by the author to apply for asylum and considers that it is not consistent with the attitude of someone who fears he will be tortured if he returns to his country. In fact, it believes that the author only applied for asylum after being arrested by the Fribourg police on 8 July 1995 in order to avoid immediate deportation.

4.10 The above considerations have also led the State party to surmise that the author had not in fact left Turkey on 2 June 1995 as he claimed. The author's file reveals that he obtained a visa for Switzerland on 15 June 1992 but there is no entry in his passport to confirm that he returned to Turkey when this visa expired. In the circumstances, and in the light of information showing that passport controls upon entering Turkish territory are quite strict, the State party concludes that the author actually arrived on Swiss territory on 15 June 1992, not on 2 June 1995, and lived there illegally until he applied for asylum. The assertions that the author was working for the PKK in 1993 therefore have even less credibility, as he was probably living in Switzerland at the time.

4.11 The author's fear of arrest because of his political activities, particularly since some of his comrades who took part in the same demonstration had been arrested, is inconsistent with the author's own statements that they used code names when taking part in the demonstrations. It would follow that neither the author nor his comrades could in fact know each other's names.

4.12 The State party also stresses that the author cited in his communication three new arguments that he had never raised during his application for asylum, even though nothing prevented him from doing so. These arguments are that his home village was notorious for its links with the PKK, that the police allegedly searched his parents' home in Turkey and that two of his male and two of his female cousins were killed because of their activities within the PKK. Aside from the fact that it is surprising they were not raised earlier, these arguments do not prove that the risk of torture cited by the author exists, insofar

as the author left his home village in 1990 and never talked of problems he may have had there in the various places where he lived afterwards. Likewise, in addition to the fact that there is no evidence to prove that members of his family were killed, the persecution and killing of some members of his family would not entitle the Committee, on the basis of its past practice, to conclude there is a risk of torture to the author.

4.13 With regard to the new documents produced by the author concerning his refusal to be drafted, the State party points out that the statement from the mayor of Calgi is of questionable value. Aside from the fact that this kind of statement is not within the prerogatives of a village mayor, the document contains no concrete indication of how its author obtained the information, which leads the State party to believe that it is a document of convenience. Moreover, it is doubtful whether this document was translated by the sworn translator of the Turkish consulate in Geneva when it was the latter that actually carried out the investigations to find it. The author's fears with regard to these investigations are inconsistent with this request for service. As for the letter from his brother that purports to confirm that the author received call-up papers on two occasions from the Turkish consulate in 1997 and 1998, the State party is not persuaded by the explanation that the brother would have kept these papers if he had foreseen any problems for the author, since it was precisely at the time the papers were issued that the author was appealing against the decision of the Federal Office for Refugees. Moreover, there is an inconsistency surrounding the dates of the call-up papers given by the author and his brother; according to the former they date from 1995 and 1997 whereas according to the latter they date from between 1997 and 1998.

4.14 The State party further emphasizes that recruitment into the Turkish army is carried out solely on the basis of the nationality and birth of conscripts and that, in the light of the system used for registering the population in Turkey, it would be technically impossible to recruit on the basis of membership of an ethnic group. Nor would it be logical to systematically send Kurdish conscripts to south-eastern Turkey, since the Turkish Government requires absolutely loyal and reliable soldiers in that region. Lastly, the courts that are competent to deal with deserters have so far passed very lenient sentences on those refusing the draft.

Further comments by the author

5.1 By letter of 25 February 2000, the author commented on the State party's observations on the merits of the communication.

5.2 With regard to the decision of the Swiss Appeal Commission on Asylum Matters, the author gives as an example of a soldier being sent to the east to fight against other Kurds the case of Ali Peduk, cited by Denise Graf, who died in service in summer 1999 from as yet unknown causes.

5.3 With regard to the convocations to the consulate, the author maintains that it was indeed his brother who told him that he had been called up in Turkey and who had received the two convocations, which called on his brother to go to the Turkish consulate in Geneva to explain the author's situation. The consulate had, unfortunately, not kept copies of the convocations, which had been returned to Turkey after one month, in accordance with usual practice. Moreover, the author says he did specify "unless he was mistaken" when giving the dates of 1995 and 1997 for the convocations. The argument put forward by the State party on this point is therefore irrelevant.

5.4 The author recalls that in addition to the sentence of two to three years' imprisonment for draft-evaders, the latter are not released from their military service after serving the sentence; it is precisely this injustice that the author denounces.

5.5 The author reaffirms that his political activities consisted of taking part in demonstrations and meetings, distributing pamphlets, acting as a host and collecting money.

5.6 With respect to article 3 of the Convention, the author is afraid not only of the sentence for desertion and the torture he will suffer during that sentence but also of being sent to the front and the risk of being killed during a clash.

5.7 With regard to the time lapse between his arrival in Switzerland and his application for asylum, the author had already provided an explanation in his appeal to the Swiss Appeal Commission on Asylum Matters and had explained that the delay was unrelated to the reasons for his application. Also, the author's brother had suggested that he rest before submitting his application because he was scared and stressed.

5.8 On the question of the date of his arrival in Switzerland, the author did not agree that the inspections on entry into Turkey were systematic. He also pointed out that he was 17 years old when he returned, so that there was nothing in his appearance to attract the attention of customs officers.

5.9 The author confirms the official nature of the statement by the mayor of Calgi and stresses that the consulate's interpreter is often asked to work as a translator in Fribourg and knows how to be discreet while respecting professional secrecy.

5.10 The author reiterates his belief that Kurdish draft-evaders are regularly sent to the south-eastern front to fight against other Kurds and on this point refers once again to the statements of Denise Graf.

5.11 Lastly, the author presents as new factors the fact that his father died in Bursa on 11 February 2000 and that because of his fears he had not wished to go to the funeral even though all his family would be there. Furthermore, some new developments in the conflict between the Turkish Government and the Kurds have convinced the author that the risks to his person are as great as ever. On the basis of various news stories, he draws particular attention to the abuses committed by Hezbollah against the Kurds and to the fact that the announcement by the PKK that it is giving up the armed struggle is mainly intended to save its leader's head. As proof that the conflict really is continuing, the author recalls that three Kurdish mayors have recently been arrested for their alleged links with the PKK.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. In the case in point, the Committee also notes that all domestic remedies have been exhausted and that the State party has not contested the admissibility of the communication. It therefore considers the communication to be admissible. Since both the State party and the author have provided observations on the merits of the communication, the Committee proceeds immediately with the consideration of those merits.

6.2 The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of the State party under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

6.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon his return to Turkey. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon his return to that country. Other grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

6.4 The Committee recalls its general comment on the implementation of article 3, which includes the following:

> "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 6).

6.5 In the present instance, the Committee notes that the State party draws attention to inconsistencies and contradictions in the author's account, casting doubt on the truthfulness of his allegations. It also takes note of the explanations provided by counsel in this respect.

6.6 From the information submitted by the author, the Committee observes that the events that prompted his departure from Turkey date back to 1995. However, the arguments put forward by the State party with regard to the actual date on which the author arrived in Switzerland have not led the author to produce any arguments that might sway the Committee or to produce evidence of his presence in Turkey during the disputed period.

6.7 The Committee also notes that the author has not provided any evidence of his membership of, or his activities in, the PKK or YCK.

6.8 Lastly, the Committee believes that the arguments put forward by the author with regard to his call-up are marred by inconsistencies, that the author's apparent inability to produce the alleged convocations issued by the Turkish consulate in Geneva is questionable and that the only document produced to back up this part of the communication contains nothing that might establish the truthfulness of his version of events.

6.9 On the basis of the above considerations, the Committee takes the view that the information before it does not show that there are substantial grounds for believing that the author will be personally at risk of being subjected to torture if he is sent back to Turkey.

6.10 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the State party's decision to return the author to Turkey does not constitute a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the French text being the original version.]

11. Communication No. 143/1999

Submitted by:	S.C. (name withheld) [represented by counsel]
Alleged victims:	The author
State party:	Denmark
Date of communication:	17 August 1999

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 10 May 2000,

Having concluded its consideration of communication No. 143/1999, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 22, paragraph 7, of the Convention.

1.1 The author of the communication is Ms. S.C., born on 21 August 1965, of Ecuadorian origin, currently seeking asylum in Denmark together with her three minor children. The author claims that she would risk torture if she is returned to Ecuador and that her forced return to that country therefore would constitute a violation by Denmark of article 3 of the Convention. The author is represented by the Danish non-governmental organization "Let Bosnia Live".

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 29 September 1999. Pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, the State party was requested not to expel the author to Ecuador pending the consideration of her case by the Committee. In a submission of 29 November 1999 the State party informed the Committee that the author and her three minor children would not be expelled to her country of origin while her communication was under consideration by the Committee.

The facts as presented by the author

2.1 The author states that she became a member of the illegal opposition party Partido Roldosista Ecuatoriano (PRE) in Santo Domingo in April 1995, but underlines that she had been an active supporter since 1985. According to the author, she was arrested on 28 May 1994 after having distributed political propaganda material. She was first held in detention for three days, when she was allegedly ill-treated by being pulled by the hair, beaten and threatened every three hours. The author further states that she was

given a six-months probationary sentence, during which she was deprived of her papers, including her passport, and her civil and political rights as an Ecuadorian national.

2.2 The author alleges that she was again detained on 13 December 1995, after having organized and participated in a unauthorized political demonstration of about 200 persons. According to the author, she was kept in detention for 10 days and allegedly starved, kicked and beaten with truncheons before she being sentenced to 10 days' imprisonment. To support her statement, the author refers to copies of medical records from the medical doctor she visited after her release.

2.3 On 26 April 1996, the author was appointed political leader for a women's group of the party. Her main tasks were to organize meetings for women, particularly from poor neighbourhoods, and inform them about their rights. She also provided assistance to families where one or both parents had disappeared.

2.4 The author's fiancé, who was also active in PRE, allegedly disappeared in 1996 after having been taken away by police in plain clothes.

2.5 According to the author, she was again detained on 27 January 1997 for having participated in a political demonstration in Santo Domingo. The author was allegedly sentenced to six months' imprisonment and claims that during her imprisonment she was starved, electric chocks were applied to her fingers and she was raped. After her release, the author contacted a doctor, but no medical records are available. The author further states that, while she was in prison in 1997, her home was broken into and everything was taken, and that she has reason to believe that the police were responsible.

2.6 The author states that at the time of her release she was told by the police to leave the country. However, instead, she joined her family in the mountains, where they had fled to prevent the author's children being taken by the authorities. While in hiding, the author learned from her sister that a warrant for her arrest had been issued because she had not left the party and had not reported to the police,after her release, as ordered. The author hid in the mountains for six months with her children before she could leave the country, allegedly with the help of PRE.

2.7 The author left Ecuador by car with her children and entered Colombia on 15 August 1998. She travelled on a valid passport issued in September 1996. On 16 August 1998 she left Colombia and arrived in Denmark on 20 August 1998 after having stayed two days in the Netherlands. The author immediately applied for asylum.

2.8 The author's request for asylum was turned down by the Danish Immigration Service on 30 October 1998. Subsequent to her appealing the Immigration Service's decision, the Refugee Board confirmed that decision on 17 February 1999. On 24 March 1999, the non-governmental organization "Let Bosnia Live", on behalf of the author, requested the Board to re-examine the case in light of new information about the author's political activities, including a letter from PRE and a copy of an order for her arrest issued by the Ministry of the Interior, dated 26 February 1999. On 28 May 1999, the Board refused the author's request to renew her application for asylum. On 30 July 1999 an appeal was made to the Ministry of Interior on humanitarian grounds. It was refused on 12 August 1999.

2.9 The author further submits that the case is not and has not been the subject of investigation or settlement, by any other international body.

Complaint

3 With reference to the facts presented, the author fears that she will be subjected to renewed torture if she is returned to Ecuador and that her forced return would therefore constitute a breach by Denmark of article 3 of the Convention.

Observations by the State party

4.1 In a submission of 29 November 1999, the State party informs the Committee that it does not contest the admissibility of the author's communication as to the form. However, the State party submits that the author has failed to establish a *prima facie* case for the admissibility of her communication under article 22 of the Convention and that the Committee should therefore declare it inadmissible. If the Committee does not dismiss the communication for that reason, the State party submits that no violation of the provisions of the Convention has occurred in relation to the merits of the case.

4.2 The State party confirms the author's explanation of the procedure used to exhaust domestic remedies, adding that when she filed her initial application for asylum, the author exercised her right to do so in her own languages. During the detailed and comprehensive initial personal interview conducted with her by the Danish Immigration Service, an interpreter was present at all times. It is further stated that the proceedings of the Refugee Board include the participation of the asylum-seeker and his or her attorney and an interpreter, as well as of a representative of the Danish Immigration Service.

4.3 With respect to the application of article 3 of the Convention to the merits of the case, the State party underlines that the burden is on the author to present an arguable case, in accordance with paragraph 5 of the General Comment on the Implementation of article 3 adopted by the Committee on 21 November 1997.

4.4 In further reference to the above-mentioned General Comment, the State party points out that the Committee is not an appellate, quasi-judicial or administrative body but rather a monitoring body. It is emphasized that the communication does not contain any information that had not already been examined extensively by the Danish Immigration Service and the Refugee Board. The State party submits that, in its view, the author is attempting to use the Committee as an appellate body in order to obtain a new assessment of a claim already considered by Danish immigration authorities.

4.5 In its decision of 17 February 1999 confirming the Immigration Service's assessment of 30 October 1998, the Refugee Board found that it was not convinced that the author had been subjected to persecution as a consequence of political activities, prior to her departure from Ecuador, nor that, upon return to her country of origin, the author would be at risk of persecution, including torture.

4.6 The State party underlines that, according to the practice of the Committee, it is decisive for the assessment of the merits of the case whether information on conditions in the recipient country supports the author's claim. The Committee's attention is drawn to the fact that PRE, in which the author allegedly has had a prominent position, is not an illegal political party as claimed by the author, but one of the largest parties in Ecuador, whom the author was not able to identify, was Head of Government in 1996.

4.7 The State party refers to the findings of the Refugee Board that the author's statements regarding the alleged detentions were characterized by some uncertainty.

4.8 Further, the State party underlines that, during her interview with the Danish Immigration Service, the author produced letters addressed to the Refugee Board by the Party Committee of PRE, a copy of two medical certificates dated 1 June 1994 and 23 December 1995, allegedly issued by her own medical doctor, and a warrant of her arrest dated 12 August 1998. In the interview with the Immigration Service, the author stated that the warrant for her arrest had been issued at that time because she had not resigned from the party as instructed. However, before the Board, the author stated that the document had been issued since she had not left the country as ordered. She had not been served with the warrant directly, but had received a copy from a friend employed by the police. The author only had copies of the medical certificates, allegedly because she did not have any permanent address and was afraid to have original documents in her possession. Taking into consideration the contents of the documents and the author's related statements, compared with the other information on the case, the Board found that the documents were not of a nature to alter its assessment of the case.

4.9 It is submitted that the author's statement regarding rape during her most recent detention should be given little weight, since this information was not brought forward by the author until the proceedings before the Board. Given that the most recent Immigration Service interview with the author prior to the Board's proceedings was conducted by a woman, and given that the author, according to her own statements, had been politically active for women's rights, it seems to decrease her credibility that no evidence to this effect had previously been given, either to the authorities or to her own attorney.

4.10 As to the Refugee Board's decision of 28 May 1999 not to reopen the case, the State party states that the Board emphasized that the new information referred to by the author as new did not contain any elements beyond those already considered by the Board and the Immigration Service during the initial proceedings.

4.11 The State party also draws the attention of the Committee to the assessment of the Board that it seemed improbable that the author would have been deprived of her identity papers for about one year after her alleged release in December 1995 and nevertheless be able to obtain a valid passport in September 1996. Furthermore, it is noted that the author gave inconsistent accounts to the immigration authorities regarding her departure from Ecuador. She has stated that she left the country legally on 15 August 1998 with a genuine passport, but on another occasion she stated that her departure was actually illegal as she travelled in the evening, did not show any passport and was not supposed to leave Ecuador because she was the subject of an arrest warrant.

4.12 In conclusion, the State party points out that the Board did not necessarily deny that in connection with demonstrations the author might have been detained as explained, but the detentions themselves were not a sufficient ground for granting asylum. This would still be the case even if the author had in fact been subjected to physical ill-treatment in connection with these detentions. The State party argues that it also follows from the practice of the Committee that a risk of being detained is not as such sufficient to trigger the protection of article 3 of the Convention and that there is no actual evidence, including medical evidence, supporting the author's claim that she has previously been subjected to torture.

4.13 Finally, the State party notes that Ecuador has not only signed the Convention against Torture but also, by a declaration of 6 September 1988, recognized the competence of the Committee to receive and consider individual communications pursuant to article 22. The State party is aware that the Committee has stated that the fact that a State has acceded to the Convention and recognized the competence of the Committee under article 22 is not in itself sufficient to preclude a return to that country being contrary to article 3, but importance should nevertheless be given thereto.

Comments by the representative of the author

5.1 In his comments on the State party's submission, the representative of the author refers to the State party's position that the author has the responsibility of presenting "an arguable case" that she would be in danger of being subjected to torture upon return to her home country. According to the representative, an arguable case has indeed been presented in the light of the author's previous experiences of persecution, including torture, and owing to her political activities for poor Indian women in Ecuador. Further, the representative points out that, according to the practice of the Committee, it is note necessary that the risk of torture be serious, in the sense of being highly likely to occur; the Committee has previously clearly stated that there need only be "more than a mere possibility of torture".

5.2 The representative considers that the State party's argumentation that PRE, contrary to what has been stated by the author, is a legal party and that its leader was President in 1996, is irrelevant to the main question under consideration, i.e. whether the author runs a risk of being subjected to torture upon return to Ecuador. The argument of the State party is based on opinion and misunderstandings rather than fact.

5.3 The representative argues that more importance should be attached to the two existing letters from the PRE local leadership describing the danger run by the author if she returned to Ecuador in view of her having been the party's leading promoter for women's rights. The Committee's attention is drawn to the letter dated 20 August 1999, which indicates that the author's replacement as leader of the party's Women's Front has already been arrested. The fact that a warrant for her arrest was issued as late as 26 February 1999 by the Ministry of the Interior ought to indicate that the author is not wanted merely for disturbing public order in the streets through political manifestations.

5.4 The representative further recalls that the author was raped in prison by prison staff, who cooperate closely with the local police. It is therefore not surprising that no medical evidence could be secured. The fact that the author did not reveal this information to the Danish authorities at an earlier stage could be explained by the fact that, like other women in similar situations, she has tried to suppress the event from her consciousness and that for obvious reasons she has limited trust in police officers and interrogators.

5.5 The representative notes that the State party does not find it credible that the author obtained a valid passport while presumably being persecuted by Ecuadorian authorities and takes this as evidence of her not being at risk of torture. This argument is inconsistent with the State party's position that all foreign nationals, including asylum-seekers, travelling to Denmark should apply for valid visas at the nearest Danish consulate before departure.

5.6 Finally, the representative submits that the fact that Ecuador is a party of the Convention is of no relevance. The question is whether Ecuador is in fact implementing the rights provided by Convention, in particular the right of leading opposition politicians not to be subjected to torture.

Issues and proceedings before the Committee

6.1 Before considering any claim in a communication, the Committee against Torture must decide whether or not a communication is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee is further of the opinion that all domestic remedies have been exhausted and finds that no further obstacles to the admissibility of the communication exist. Since both the State party and the author's representative have provided observations on the merits of the communication, the Committee will proceed with the consideration of those merits.

6.3 The issue before the Committee is whether the forced return of the author to Ecuador would violate the obligation of Denmark under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

6.4 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Ecuador. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or return to that country; specific grounds must exist indicating that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

6.5 From the information submitted by the author, the Committee notes the author's activities for women's rights in Ecuador. It further notes that the State party, although expressing doubts as to the complete veracity of the author's account, do not necessarily dispute that the author might have encountered difficulties with the Ecuadorian authorities because of her political activities. The Committee recalls, *inter alia*, that the author has carried out her political activities as a member of a lawful political party of a country which has ratified not only the Convention against Torture, but has also made the optional declaration under article 22 of the Convention.

6.6 The Committee notes that for the purposes of article 3 of the Convention, the individual concerned must established that he or she faces a foreseeable, real and personal risk of being tortured in the country to which he or she is returned.

6.7 It is the view of the Committee that the information presented by the author does not show substantial grounds for believing that she runs a foreseeable, real and personal risk of being tortured if she is returned to Ecuador.

7. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the author to Ecuador does not constitute a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the English text being the original version.]

B. Decisions

1. Communication No. 86/1997

Submitted by:	P.S. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Canada
Date of communication:	19 June 1997

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 18 November 1999,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is P.S., an Indian national born in the Punjab in 1944 and currently resident in Canada, where he is seeking asylum and faces deportation. He claims that his return to India would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the communication to the attention of the State party on 3 September 1997.

Facts as presented by the author

2.1 The author used to be a farmer belonging to the Bhrat Kissan Union, a trade union whose objective is to put pressure on the federal Government to improve agriculture and conditions for farmers. He was arrested and detained for several days in 1989, 1990 and 1992. In November 1993, four Sikh militants wanted by the police hid in his sugar-cane field. The police questioned him about the militants and, not convinced that he had nothing to do with them, arrested him. He was tortured while in detention. Among other methods of torture, the police hung him from the ceiling and then abruptly released the rope holding him up, whereupon he fell to the floor, dislocating his shoulder. He was released on 29 November 1993 after his brother had handed over a sum of money and on condition that he collaborate with the police. He decided to move to Panchkula, in Haryana province, and then to New Delhi, where he obtained a passport. During his stay in Panchkula, the police harassed his wife to make her say where he was. On 5 February 1994, she too was arrested.

2.2 The author states that he paid an agent to help him obtain a Canadian visa. On 10 June 1994, he left India for the United Kingdom, where he stayed for some months before going on to Canada.

2.3 On 30 August 1994, the author applied for refugee status, but his application was rejected in February 1996 by the Immigration and Refugee Board. He then applied to the Federal Court for leave to seek judicial review of the rejection. That application was rejected on 17 June 1996. Finally, the author submitted his case to a "post-claim determination officer" at the Ministry of Citizenship and Immigration to determine whether he could settle in the country as a "non-recognized applicant for refugee status in Canada". Before granting that status, an immigration officer must determine whether repatriation would constitute a risk to the applicant's life or safety.

2.4 On 23 September 1996, the immigration officer determined that the applicant was not one of those covered by the risk of return programme. The author was therefore summoned to the Immigration Centre on 22 October 1996 so that an expulsion order could be served on him. The author claims that the post-claim determination officer's decision was illogical, since it merely repeated the decision of the Immigration and Refugee Board without taking into account the reports of two health experts (a psychologist and a doctor),* who had concluded that his allegations of torture were credible. The psychologist had diagnosed "a state of chronic post-traumatic stress caused by his illegal detentions and the torture and police brutality he had been subjected to in prison, death threats, police brutality to his wife which he had witnessed, death threats and a major bout of depression caused by the loss of significant social roles".

The complaint

3. The author argued that he would be imprisoned, tortured or even killed if he returned to India, where human rights violations within the meaning of article 3, paragraph 2, of the Convention are frequent, particularly against Sikhs; he provided reports from non-governmental sources containing information to that effect. He also submits a medical certificate dated 28 August 1996, which confirms the existence of scars and conditions that may be consistent with his allegations of torture. To support his complaint he refers to other decisions on asylum in which the Canadian authorities recognize that Sikhs have been subject to persecution in India. Lastly, he claims that, if he were obliged to return to India, he would no longer be able to apply to the Committee, since India is not a party to the Convention.

State party's observations on admissibility

4.1 In its response of 26 March 1998, the State party contests the admissibility of the communication. It states that, in the first place, the author of the communication has not exhausted all available domestic remedies and secondly, the communication does not give substantial grounds for believing that the author's return to India would place him in danger of being subjected to torture.

4.2 The author has twice applied to the Federal Court for leave to seek judicial review of the post-claim determination officer's decision: on 8 October 1996 (when he represented himself) and on 11 October 1996 (through counsel). He withdrew his first application on 31 October 1996. As to the second application, since the author had not submitted the requisite documents in time and had not requested an extension in order to do so, it was rejected by the Federal Court on 31 January 1997.

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* These reports are dated 23 June 1995 and 17 July 1995, respectively. According to the doctor's report, the author stated that he had also been tortured in detention in December 1990 and July 1992.

4.3 On 18 October 1996, the author applied to settle in Canada as an exception to the immigration regulations requiring the application to be made abroad. This request, for what is known as a "ministerial dispensation on humanitarian grounds", was denied as unfounded. The author could have sought judicial review of the denial of ministerial dispensation on humanitarian grounds but did not do so. This remedy is still available even though the time limit has run out, since it is possible to request an extension.

4.4 The author was summoned on 22 October 1996 to the Immigration Centre in Montreal so that arrangements could be made for his departure from Canada. However, he did not appear as requested. A warrant for his arrest was therefore issued on 4 February 1997. To date, the author has neither been arrested nor returned to his country and is at an unknown address.

4.5 The Convention provides for two exceptions to the requirement that all available domestic remedies must have been exhausted. An individual does not need to resort to remedies whose application is unreasonably prolonged or which are unlikely to bring effective relief. The remedy of judicial review of the immigration official's decision to deny the author the status of "non-recognized applicant for refugee status" is not covered by either of these exceptions.

4.6 This remedy could be applied within a reasonable period. Although the law does not provide for automatic suspension, the Federal Court is by definition competent to suspend an expulsion order while an application for judicial review is processed. In order to obtain such a suspension, the applicant must show: (i) that the application concerns an issue of substance to be resolved by the Court; (ii) that he would suffer irreparable damage if the suspension was not granted; and (iii) that the balance of disadvantages favours him. Such a request can, if necessary, be submitted and heard as a matter of urgency, sometimes within a few hours.

4.7 Moreover, this remedy would in all likelihood have given the author some relief. If the Federal Court had been satisfied that an error had been made by the administrative authorities, it could have ordered a new inquiry to be held. Any fresh consideration of the case based on the Federal Court's Guidelines would have been likely to grant the author the right to settle in Canada. In addition, an application for judicial review of the denial of ministerial dispensation might ultimately have made it possible for him to settle in the country on humanitarian grounds.

4.8 For a communication to be admissible, it must provide at least some backing for the allegations it makes about violations of the Convention by the State concerned. If this is lacking, the communication does not comply with article 22 of the Convention and is therefore inadmissible. In the present case, the author has not established substantial grounds for believing that he personally would be in danger of being subjected to torture if he returned to India.

4.9 The State party recognizes that India's human rights record has given rise to considerable concern. Nevertheless, the situation in India, and in particular in the Punjab, has significantly improved in recent years, as shown in the United States Department of State country report on human rights practices for 1997 concerning India, published on 30 January 1998. Since the new Government took office in June 1996, a number of steps have been taken to ensure greater respect for human rights in India. For example, the Government signed the Convention on 14 October 1997 and announced its intention to take steps to prevent and punish acts of torture on its territory.

4.10 In February 1997, four experts on the Punjab provided information to the Immigration and Refugee Board on various issues relating to human rights, peace and order in India. According to these experts, the central Government has for several years been trying to bring the Punjabi police, who have been responsible for many extrajudicial executions and disappearances during the fight against insurgents, to

heel. While in the late 1980s and early 1990s a blind eye was turned to police abuses, it is now recognized, particularly by the Ministry of the Interior and the Supreme Court in New Delhi, that the Punjabi police need to be brought under control. As a result, many cases against Punjabi police officers have been reopened. However, the experts say that the climate of impunity that protects the Punjabi police will change only slowly, because the problem is a long-standing one, rooted in firmly entrenched attitudes.

4.11 According to one of the experts, the use of force is part of the culture of the Punjabi police, who still have the power to commit many unacceptable acts without being held accountable. For example, they still have the power to take people to a police station and mistreat them. Police torture is endemic in India. Another of the experts emphasized that, although the ill-treatment meted out to detainees in the Punjab is serious, it is no worse than elsewhere in India today. The experts also pointed out that those who are not suspected of being leading activists are not at risk in the Punjab today and that there is now considerably better access to the legal system for those who do suffer ill-treatment.

4.12 As regards the possible risks faced by those returned to India by Canada, one of the experts stated that representatives of the Canadian High Commission in New Delhi regularly observed the arrival of persons deported from Canada at the airport. There have been 8 or 10 such cases in recent years and the Indian authorities have left all these people alone, apart from one leader of the Khalistan Commando Force, who was arrested. The expert also stated that in the past few years, Canadian High Commission staff in New Delhi have held immigration interviews with many dependants of people from the Punjab to whom Canada has granted refugee status. In the overwhelming majority of cases, the dependants do not corroborate their relative's statements, indicating that the relative went to Canada for economic reasons.

4.13 According to the State party, neither the Immigration and Refugee Board nor the reviewing official found the author's allegations credible, because of the numerous inconsistencies they discovered in the course of their inquiries. They also noted that the author's behaviour between the time of his release in November 1993 and his application for refugee status in Canada in August 1994 was inconsistent with fear of persecution by the police. As a farmer, the author was hardly likely to be considered a "leading activist". He would therefore not be in any danger of torture if he returned to his country.

4.14 The State party therefore concludes that the author's communication demonstrates no special circumstances in support of the allegation that he would face a real and personal risk of being subjected to torture. Although the author alleges that he was tortured by the Indian authorities between 25 and 29 November 1993 and says he fears police persecution, there is no indication that the Indian authorities have been looking for him since that time. He makes no claim to be an opposition activist and his behaviour since his release is inconsistent with a reasonable fear of being imprisoned, tortured or killed, or even of being wanted by the Indian authorities.

4.15 Although the author submitted medical reports to the Canadian authorities, including one by an orthopaedist who noted injuries that were not inconsistent with the allegations of torture, the injuries did not substantiate the medical reports since the reports were based on information supplied by the author himself, whom the authorities do not find credible.

4.16 In the light of the foregoing, the State party argues that the author has not established prima facie grounds for believing that returning him to India would expose him to a personal risk of torture, and that the communication should therefore be declared inadmissible.

Author's comments

5.1 As regards the State party's objection that domestic remedies have not been exhausted, the author states that, as far as immigration is concerned, all remedies in the Federal Court are in practice illusory, since they are discretionary and only very rarely granted. The Federal Court rarely intervenes in matters of fact such as the author's case. All the case law shows that the Federal Court has consistently exercised judicial restraint in such cases.

5.2 Given that the Federal Court almost never intervenes and that when it does it upholds 98 per cent of the Immigration and Refugee Board's decisions, including subsequent reviews (risk of return), it would be highly unusual – not to say quite improbable – for the Court to intervene in the author's case. Moreover, the fact that a case has been brought before the Federal Court in no way prevents the Canadian authorities from expelling someone; this is in fact common practice. And since the authorities have already issued an arrest warrant, the author can be arrested at any time and sent back to India without further ado.

5.3 In its comments, the State party states that the author neglected to exercise his appeal options (judicial review). In fact, the remedy exists only on paper since, in practice, it hardly ever affords the relief sought.

5.4 The State party also criticizes the author for not applying for ministerial dispensation on humanitarian grounds. Such applications are, however, subject to a fee. Moreover, as the author had an expulsion order hanging over him, the application would have afforded him no protection.

5.5 The same comments apply to the application under what is known as the risk of return programme. The mechanisms established by Canada under the risk of return programme are farcical, since less than 3 per cent of cases are approved.

5.6 The author does not share the State party's opinion that the communication does not establish substantial grounds for believing that he would be in danger of being subjected to torture if he returned to India. He emphasizes the importance of the results of the medical examinations, which give every reason to believe that he has been subjected to torture in the past. Under the circumstances, there is more than a risk that the author would again be subjected to torture if he were obliged to return to India.

5.7 The author finds it paradoxical that over the past few years Canada has allowed in a great many other applicants facing exactly the same problems as those he describes. The only difference seems to be that the Board did not consider him credible. This finding, if that is what it can be called, relies to a very large extent on subjective judgement and does not take proper account of the objective dangers the individual concerned may face.

5.8 Lastly, the author argues that the State party has never fulfilled its obligations under the Convention. Domestic legislation does not embody the main articles and remedies set forth in the Convention. No law has been enacted to establish mechanisms to enable persons such as himself to address the competent authorities in case of need. The Immigration and Refugee Board has always argued that it is not competent to implement the Convention, merely saying that that is the prerogative of the Minister for Employment and Immigration. However, the Minister has never issued any guidelines or amended immigration law to incorporate the Convention. It is therefore impossible to say who is responsible for implementing the Convention or what steps have been taken to ensure that Canada fulfils its obligation not to deport a person who is in danger of being subjected to torture in his country of origin.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. In the case under consideration the Committee notes that the communication is not anonymous and that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement. It also notes that the communication is not an abuse of the right of submission of such communications or incompatible with the provisions of the Convention.

6.2 The State party contends that the author has not exhausted domestic remedies. The Committee notes in this respect that the author tried the following remedies:

Application for refugee status to the Immigration and Refugee Board (rejected in February 1996);

Application for leave to seek a judicial review of the rejection (rejected in June 1996);

Application before a post-claim determination officer of the Ministry of Citizenship and Immigration (rejected on 23 September 1996);

Two applications for leave to seek a judicial review of the decision of the "rejected claims review officer" to the Federal Court (the first one was withdrawn and the second one was rejected in January 1997 for not having been submitted on time);

Application for "ministerial dispensation on humanitarian grounds" (denied as unfounded).

6.3 The State party claims that the author should have completed his application for judicial review of the decision of the post-claim determination officer and that he could still try to apply for judicial review of the denial of ministerial dispensation on humanitarian grounds. The Committee considers that even if the author claims that these remedies are illusory, he has furnished no evidence that they would be unreasonably prolonged or unlikely to bring effective relief. The Committee therefore notes that the conditions laid down in article 22, paragraph 5 (b), of the Convention have not been met.

7. The Committee consequently decides:

(a) That the communication is inadmissible;

(b) That this decision may be reviewed under rule 109 of the Committee's rules of procedure upon receipt of a request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply;

(c) That this decision shall be communicated to the State party, the author and his representative.

[Done in English, French, Russian and Spanish, the English text being the original version.]

2. Communication No. 93/1997

Submitted by:	K.N. (name deleted) [represented by counsel]
Alleged victim:	The author
State party:	France
Date of communication:	15 August 1997

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 18 November 1999,

Adopts the following decision:

Decision on admissibility

1.1 The author of the communication is K.N., born in 1963, a national of the Democratic Republic of the Congo (former Zaire) currently living in France, where he has asked for asylum and faces deportation. He asserts that to return him to the Democratic Republic of the Congo would constitute a violation by France of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the communication to the attention of the State party on 17 December 1998.

Facts as submitted by the author

2.1 The author says that he was a student leader in Zaire, and organized student demonstrations against President Mobutu's regime. He gives no description of his activities in Zaire, but submits copies of a wanted notice for him issued on 4 May 1992, an arrest and detention warrant for incitement to rebellion drawn up by the Ndjili Prosecutor's Office on 22 April 1992 and a pre-trial release on bail order for his brother dated 24 July 1992.

2.2 On arrival in France on 6 June 1992, the author applied to the French Office for the Protection of Refugees and Stateless Persons (OFPRA) for refugee status; his application was denied on 11 August 1992, and the denial was upheld by the Refugee Appeal Board (CRR) on 17 December 1992.

2.5 The author then requested a review of his file, stating that there had been some new factors, namely that certain members of his family had allegedly suffered severe ill-treatment,[*] and provided copies of documents showing that he was still a wanted man. Meanwhile, by an order dated 15 April 1993, the Paris Prefect of Police decided that he should be deported.

2.6 By decision dated 23 April 1993, OFPRA rejected K.N.'s fresh application on the grounds that the alleged new developments did not establish that his alleged fears were justified since his statements were not backed up by any convincing evidence. That decision was confirmed by CRR on 28 September 1993 on the same grounds, at a time when the current case law did not accept that considerations that could have been attached to the initial application were admissible as new factors. The author maintains, however, that the new factors were relevant enough for the Paris Administrative Tribunal to annul the first deportation order, in a ruling dated 5 May 1993 following the rejection of his initial application.

2.7 The communication reveals that a second deportation order was issued, but the author states that he never knew of its existence, probably because it was sent to him at his previous address. He affirms that, since he was not notified of that second order, an appeal against it had become inadmissible.

2.8 On 12 March 1994, the author was arrested after an identity check and transferred to the detention area of the Paris Law Courts. A hearing was arranged immediately and, in a judgement dated 14 March 1994, the Paris Correctional Court sentenced him to a three-year ban from French territory for theft and for being in France illegally. The charge of theft was for carrying an identity card which, according to the author, his brother-in-law had lent him. On 20 March 1994, K.N. was put aboard an aircraft bound for Brussels and Kinshasa.

2.9 The author states that, upon his arrival in Zaire, he was detained after passing through immigration control at the airport. There he was allegedly subjected to a stern interrogation carried out by an army officer who withheld the papers relating to his application for asylum, in particular the OFPRA and CRR decisions.

2.10 K.N. says he was imprisoned without trial in Makala prison until January 1995. Held in an overcrowded cell, deprived of food, clothing and hygiene, he was constrained to drink water mixed with urine and excrement from the cell, and was often beaten with truncheons once or twice a day, also being subjected to various kinds of ill-treatment and torture. He was also made to perform forced labour. Some months later, a prison guard to whom his uncle had given money moved him to a different cell and secured for him a transfer docket to the central hospital in Kinshasa, where he was to obtain medical attention. Arriving at the hospital on 19 January 1995, the author met his uncle, who first took him by car to a friend's house and then helped him to cross the frontier into the Congo by boat. He allegedly arrived back in France in March 1995.

2.11 Being still banned from the country, the author had no alternative, if he wished to regularize his situation, but to lodge a plea with the Ministry of Justice to set aside the judgement of the Paris Correctional Court dated 14 March 1994. His plea was rejected on 16 October 1996.

2.12 Pursuant to the provisions of the ministerial circular dated 24 June 1997 on the review of the situation of certain categories of aliens illegally present in the country, the author lodged a request for

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[*] The author states that his wife was arrested and imprisoned after his departure, but he has no evidence

exceptional authorization to reside in France. The request was rejected by the Prefect of Haute-Vienne on 3 July 1998 on the grounds that the author did not satisfy the conditions for benefiting under any of the provisions of the circular. More particularly, he had not furnished sufficient evidence of his personal situation to demonstrate that returning him to his home country would put him at serious risk of inhuman or degrading treatment. He was therefore given one month in which to leave French territory. The Minister of the Interior rejected the author's appeal against the Prefect's ruling on 16 December 1998.

2.11 K.N.'s counsel asserts that the author is utterly without rights, he has no legal means of regularizing his situation, no resources and no entitlement to housing, social security, employment, etc. He is living in hiding, receiving occasional help from people who feed and shelter him, and may be discovered and expelled at any moment.

The complaint

3.1 The author considers himself to be at risk of being arrested and tortured if he is returned to the Democratic Republic of the Congo, even though the present regime is not the same as the one that was in power when he left the country: he is known to the security service, where some old hands still have influence. His forcible return would thus be in breach of article 3 of the Convention.

3.2 The author has submitted to the Committee a copy of a letter posted in Kinshasa on 16 June 1995 telling him that his wife's dead body had been found, headless, while he was still in prison in Zaire.[4] According to the letter, his family does not know whether the discovery and the author's arrest are connected. The author also asserts that his daughter was abducted in November 1997 and held for several days at a secret location, but he provides no details of the persons responsible or the circumstances in which the abduction allegedly took place.

State party's observations on admissibility

4.1 By letter dated 20 April 1999, the State party challenges the admissibility of the communication. It argues non-exhaustion of the domestic remedies available to the applicant, both during the proceedings leading up to his expulsion to Kinshasa in March 1994 and since his return to France in 1995. It also disputes the author's claim to be a victim.

A. Proceedings leading up to author's deportation in 1994

4.2 By judgement dated 14 March 1994, the Paris Correctional Court banned the author from French territory for three years and ordered provisional execution of its sentence. The author, who was deported on 20 March 1994, entered no appeal against that judgement, although he had 10 days in which to do so by virtue of articles 496, 497 and 498 of the Code of Penal Procedure.

4.3 It is true that the judgement was for immediate enforcement and that the author was liable to be deported at any time, even before the 10 days had elapsed. There was, however, nothing to prevent K.N. from availing himself of this judicial remedy so as to have his case reviewed by the Court of Appeal.

B. Proceedings after the author's return to France in 1995

4.4 Contrary to what is asserted in the communication before the Committee, the author did have the possibility, from the moment of his secret return to France in 1995, of explaining to the French administrative authorities the risks he ran in his country of origin and securing an administrative ruling protecting him from any action to expel him to the former Zaire. Indeed, he could validly have submitted a fresh application for refugee status to OFPRA.

4.5 It is true that the decree dated 14 March 1997, amending the decree of 2 May 1953, stipulates that a fresh application for recognition of refugee status must be preceded by a fresh application for provisional authorization to reside in France. It is nonetheless the case that the decree was adopted only in March 1997, and cannot therefore be invoked by the author as a reason for not applying to OFPRA between March 1995, when he returned to France, and March 1997, when the new decree was published.

4.6 Moreover, the obligation, deriving from article 2 of the Act of 25 July 1952 establishing OFPRA, to make oneself known to the authorities at the prefecture before applying to OFPRA for recognition of refugee status does not render registration of such a request by OFPRA contingent upon a prior decision by the prefecture to give permission to reside in France.

4.7 Even if an alien is not granted authorization to reside legally in France with a duly issued permit, he is always entitled to have his application for refugee status considered by OFPRA. Article 2 of the aforementioned Act of 25 July 1952 states that, when provisional authorization to reside in France is withheld, OFPRA shall accord priority to examination of the request for recognition of refugee status, and article 12 of the same Act says that an alien to whom permission to reside in France has not been granted on any of the grounds set forth in article 10 shall nonetheless be entitled to remain in France until the decision reached by OFPRA is notified.

4.8 Thus, though indeed not entitled to obtain a residence permit as long as the ban on his presence on French territory remained in effect, the author cannot seriously assert that this prevented him from submitting a fresh application for refugee status or emphasizing the risks he would run if returned to his home country. Furthermore, since his banishment from French territory ceased to be effective as from March 1997, the author could thereafter have submitted an application for recognition of refugee status subject to the usual conditions.

4.9 Given that the author could prove that he had been returned to his country of origin after the rejection of his application by OFPRA and CRR in 1993, a fresh application for recognition of refugee status would have been regarded as a first application and not as an "abuse of process" or "deliberate fraud", which could, under the terms of article 10 of the Act of 25 July 1952, justify a refusal of provisional authorization to reside in France. The author could thus have been granted a provisional authorization to reside in France until OFPRA and, on appeal, CRR had ruled on his application.

4.10 Nor can the author maintain that the judicial authorities could not have been persuaded to lift the order banning him from France after his secret return in 1995. Article 28 *bis* of the ordinance of 2 November 1945 does indeed say that an application to lift a ban from French territory can be entertained only if the alien is living outside France, but the same article provides for an exception where the alien is subjected to a restricted residence order. Since such an order is issued by the administrative authorities when it is established that the individual concerned cannot return to his country of origin because, *inter alia*, of the risks he might be exposed to there, the author was at liberty to appear before the authorities in the appropriate prefecture to have his situation considered in that regard. He refrained from taking such action.

4.11 It is thus clearly apparent that, since returning to France in 1995, the author has not made use of the legal channels which would have enabled him effectively to explain both to OFPRA and CRR and to the administrative authorities the risks to which he would be allegedly exposed in his country of origin, and to secure effective protection against any action to expel him.

4.12 On the other hand, the author of the communication under consideration has recently brought two appeals before the administrative courts: the first, dated 18 February 1999, seeks a stay of execution of the decision dated 3 July 1998 by the Prefect of Haute-Vienne rejecting his application for residence, and the second, dated 25 February 1999, seeks to have that same decision quashed. Since those two appeals are currently pending, the communication is premature.

C. The author's lack of victim status

4.13 The author is at present illegally on French territory, inasmuch as his latest application for a residence permit, submitted pursuant to the circular dated 24 June 1997 on the review of the situation of certain categories of illegal aliens, was definitively rejected by ministerial decision on 16 December 1998. Nevertheless, he does not at present face any administrative or judicial action to expel him. The decision banning him from French territory for three years taken by the Paris Correctional Court on 14 March 1994 has lapsed. Nor is there any order for his deportation for being in France illegally. So long as no such order has been issued by the Prefect, he is safe from any action to expel him to the former Zaire.

4.14 On the assumption that such an order were issued, its implementation would require a decision by the Prefect naming the country of destination. If, at that time, the individual concerned established that his life or liberty would be at risk or that he would be exposed to treatment in breach of article 3 of the European Convention on Human Rights in the event of being returned to his country of origin, expulsion to that country could not be carried out by virtue of article 27 *bis* of the aforesaid ordinance, and he would be made subject to a restricted residence order in accordance with article 28 of the ordinance.

4.15 If, nonetheless, having heard the author's explanations, the administrative authorities were to consider that the risks in the event of his return had not been established, the author would still however have the possibility of challenging, in the administrative courts, not only the deportation order itself but also the decision on the country of destination. Such an administrative law appeal would, under article 27 *ter*, have the effect of staying execution, and the deportation order could thus not be put into effect until the court had handed down its ruling. The administrative court has full control of the decision fixing the country of destination and could therefore annul it if it considered the risks proven. In that event, the individual concerned would also benefit from a restricted residence order pursuant to the aforementioned article 28.

4.16 At present the author, who is not subject to any enforceable decision to expel him to his country of origin, cannot plead that he is the victim of a breach of the Convention within the meaning of article 22, paragraph 1, thereof. In any event, if he were to be notified of a decision naming his country of origin as the country of destination, he would have open to him effective remedies which he would have to exhaust before making application to the Committee.

Comments by counsel

5.1 K.N.'s counsel submits objections to the State party's observations on admissibility.

A. Failure to exhaust domestic remedies in respect of the ban from French territory ordered on 14 March 1994

5.2 Counsel points out that it is scarcely reasonable to maintain that the author, who was arrested on 13 March 1994, sentenced to banishment from French territory the day after, immediately detained with a view to the execution of the sentence, and then forcibly sent back to Zaire on 20 March, had had an opportunity to lodge an appeal. Appeals must be lodged in person with the clerk of the Court of Appeal,[e] the only exception being that **prisoners**, i.e. persons sentenced to a term of imprisonment, are given the possibility of entering an official appeal in the prison establishment.[f] K.N., who had not been sentenced to any term of imprisonment, was **detained**, first in premises not under the authority of the Prisons Administration, then in the aircraft and then in Zaire.

5.3 It is, moreover, generally acknowledged, on the one hand, that cases before the Paris Court of Appeal take about eight months to come up for a hearing and, on the other hand, that in cases of the present kind, heard by the Twelfth Division of the Court, the penalties are automatically upheld if not increased. In no circumstances could this be regarded as an effective and adequate judicial remedy since, even if it had been materially possible to lodge an appeal, the appeal entailed no stay of execution and would have done nothing to change the forcible execution of the author's banishment from French territory.

B. Failure to exhaust domestic remedies after the author's return to France in 1995

5.4 The State party maintains that the author could have submitted an application for asylum to OFPRA, could have requested assignment to a fixed place of residence and has an appeal pending before the Administrative Court.

5.5 No lawyer or association would take the responsibility of advising the author to enter a fresh application for asylum, either in 1995 or nowadays. Doing so would almost automatically lead to the author's expulsion. Under French law, any application by an alien for permission to reside in France (and hence for asylum, a request for asylum being possible and admissible only after residence for that purpose has been authorized by the administration) requires the applicant to go in person to the prefecture, pursuant to article 3 of the decree dated 30 June 1946 as amended and definitively interpreted by the Council of State. That, of course, has a strong deterrent effect since anyone who is not already in possession of residence papers or a residence permit is *ipso facto* liable to be issued with an immediate deportation order. Thus proceedings to regularize an alien's situation often result in the alien being arrested at the counter in the prefecture, served notice of a deportation order, and deported a few days later.

5.6 The State party wrongly maintains that, before the decree dated 14 March 1997 which prohibits any application for asylum before the prefect has granted permission to reside in France, nothing prevented the author from approaching OFPRA. Before the decree, any fresh application from an asylum-seeker who had been once refused was considered inadmissible because it conflicted with a previous final decision: the *ipso facto* result was the deportation of the applicant. Thus, when the author submitted a second application for asylum in March 1993 the only concrete result was the issue in the following few days of the customary deportation order and a decision to expel him to Zaire on 15 April 1993. Only following the rulings by the Council of State on 21 June 1996 (*Prefect of Yvelines* v. *SARR*, No. 168785 and *Lakkis*,

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[e] Code of Penal Procedure, article 502.

[f] *Ibid.*, article 503.

No. 16053) was the right of a "reapplicant" for asylum to reside in France recognized in certain cases, and then only for a short while, since the decree of 14 March 1997 expressly banned any fresh application in the absence of permission from a prefect to reside in France. It is scarcely realistic, therefore, to suggest that the author ought to have submitted a third application, and no one with professional experience of the law on aliens would have considered doing so. What is more, until 14 March 1997, which was the date on which the decree took effect, the author was still legally banned from French territory for three years by the decision handed down by the Paris Correctional Court on 14 March 1994, and could not by definition be granted permission to reside in France – and thus to submit an application for asylum, which necessarily supposed previous authorization to reside in France.

5.7 The State party wrongly suggests that, after 14 March 1997, the author could have approached OFPRA even without being authorized to reside in France. Under French law, OFPRA cannot be approached directly; it only considers applications for asylum forwarded by a prefecture which has granted the asylum-seeker permission to reside in France.

5.8 As regards the assignment to a fixed place of residence (which confers no right to work, welfare coverage, etc.), counsel argues that this is a discretionary measure which the administration may take but which cannot be requested from an independent authority or court: it cannot therefore be regarded as a "judicial remedy" within the meaning of international law. As the State party indicates, the administration may take such a step if it considers it has been shown that the individual concerned cannot return to his country of origin in view, *inter alia*, of the risks to which he is exposed. It will be recalled that, for seven years, the administration has taken the view, when the question of asylum, residence or expulsion has arisen, that returning to his country of origin will not cause the author any problem. It is hard to see how things would be any different if the question of assignment to a fixed place of residence arose.

5.9 The appeal against the refusal of permission to reside in France currently pending before the Limoges Administrative Court does not entail a stay of execution and thus affords the author no protection whatsoever against forcible return to his home country. In parallel with his request to have that refusal overturned, the author submitted, in February 1999, an application for suspension of the contested decision. That procedure, too, does not entail a stay of execution. While, theoretically, it should be pursued as a matter of extreme urgency,[6] one need only observe that the application has still not been heard and that delays in such cases can run into years. As for the appeal, counsel states that, in 1999, petitions submitted in 1994 were coming up before the Limoges Administrative Court for a hearing.

5.10 As for the substance, the appeals lodged, even if they entailed a stay of execution and even if they were heard within a reasonable period, would, in keeping with constant case law, be rejected. Applications for suspension are consistently held to be inadmissible unless the contested decision places the petitioner, already in an irregular situation, in a new de facto and *de jure* situation. With regard to the substance, moreover, there is first of all case law that is just as constant that fears in the country of origin are of no avail against a refusal of permission to reside in France. Secondly, the applicant always bears the burden of providing conclusively the truth of the facts he cites; yet by definition, no absolute proof such as the French administration and courts demand can be provided in the present case.

C. The author is not a victim in the absence of expulsion proceedings

5.11 According to counsel, keeping the author in a situation where he has no right to any legal support, housing, or welfare coverage is in itself suffering intentionally inflicted and/or condoned with the objective

[6] Administrative Courts and Administrative Appeals Courts Code, article R 120.

of persuading him not to remain in French territory, and constitutes inhuman and degrading treatment and torture within the meaning of article 1 of the Convention.

5.12 One has only to read the decision by the Prefect of Haute-Vienne refusing the author permission to reside in France, notice of which was served on him on 27 July 1998, to see that he is given a month to leave the country, after which time an order for his deportation will be issued. French administrative practice is as follows. Either a deportation order is sent by recorded delivery to the individual's last known address; in this case it is final, and that the individual may not know of its existence is irrelevant; or else a deportation order is immediately produced, served on the individual and put into effect when he is arrested or subjected to an identity check. In the former case, the individual has seven days in which to appeal. K.N. does not know whether such a letter was sent to him. In the latter case, an appeal must be entered within 48 hours. It cannot seriously be maintained that, in such circumstances, the author would have the time and opportunity to establish what risks he is running, when he had been denied the option of doing so since 1992. Such an appeal did indeed entail a stay of execution, but the court is required to give its ruling within 48 hours. In the circumstances, this cannot be regarded as an effective and appropriate remedy.

5.13 According to counsel, arguments based on fears and on risks run in the country of destination are of no avail against the expulsion order itself and can at best serve to have the decision as to country of destination overturned where appropriate. Besides the additional procedural complication this creates for the alien, who must remember to state specifically that he also contests the possible decision as to country of destination and adduce separate factual and legal arguments for that purpose, there is nothing that obliges the administration to notify the decision as to country of destination at the same time as the expulsion order. On the contrary, it has now become common practice, precisely in order to prevent any appeal entailing stay of execution from being lodged, not to notify an alien in detention of this decision until the 48 hours for appealing against the expulsion order have expired. That alien who is being expelled has the two months allowed under ordinary law to enter a traditional appeal against the decision as to country of destination. That appeal, which does not entail a stay of the expulsion, will be heard after the customary delay of some years.

The Committee's considerations

6.1 Before considering any claims contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the author has exhausted all available domestic remedies; this does not apply where it has been established that the application of the remedies has been or would be unreasonably prolonged or that it is unlikely to bring effective relief to the alleged victim.

6.3 In the present case, the Committee notes that, since arriving in France in 1995, the author has not submitted a fresh application for refugee status to OFPRA although there are new facts which he could adduce. The Committee notes, in that connection, the statement by the State party that, though not indeed entitled to obtain a residence permit so long as the ban on his presence on French territory remained in effect, the author could not seriously maintain that this state of affairs prevented him from submitting a fresh application for refugee status or emphasizing the risks he would run if returned to his own country. The State party also says that, his banishment from French territory having ceased to be effective as of March 1997, the author could thereafter have submitted an application for refugee status subject to the usual conditions. The Committee notes also that the author's appeal against the decision by the Prefect rejecting his application for residence and his application for suspension of the expulsion order, lodged before the administrative authorities in July 1998 and February 1999 respectively, are currently pending.

In the circumstances, the Committee finds that the conditions laid down in article 22, paragraph 5 (b), of the Convention are not met.

7. The Committee consequently decides that:

(a) The communication is inadmissible as it stands;

(b) Under rule 109 of the Committee's rules of procedure, this decision may be reviewed if the Committee receives a written request by or on behalf of the author containing evidence to the effect that the reasons for inadmissibility no longer apply; and

(c) This decision shall be communicated to the author of the communication and, for information, to the State party.

[Done in English, French, Russian and Spanish, the French text being the original version.]

3. Communication No. 95/1997

Submitted by:	L. O. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Canada
Date of communication:	23 October 1997

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 19 May 2000,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. L. O., a Ghanaian national, born on 27 December 1967, who was deported after having sought asylum in Canada. He claims that his deportation to Ghana constitutes a violation by Canada of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3 of the Convention, the Committee transmitted the communication to the State party on 19 November 1997. At the same time, The Committee requested the State party pursuant to rule 108, paragraph 9 of the Committee's rules of procedure, not to expel the author to Ghana while his communication was under consideration. In a submission of 22 January 1998,

the State party informed the Committee that the author had been removed from Canada on 27 October 1997, prior to the receipt by the State party of the communication and its request for interim measures.

The facts as presented by the author

2.1 In 1987, the author, then a student, was arrested following mass protests against educational reforms. In 1990, the author began teaching at a secondary School. In 1992, he became a member of the New Patriotic Party and represented this party at a polling station during elections in November of the same year. Although he reported irregularities to the police, they were ignored.

2.2 In September 1992 the author started his studies at the University for Science and Technology in Kumasi. In January 1993, he became an active member of the National Union of Ghana Students. On 24 March 1994, he represented the University at the 24th Annual Congress of the Union and spoke out against the educational reform policy of the Government and against the frequent arrest of students. As a result of his speech, the author was expelled from the university, together with 20 others. On 31 March 1994, following a demonstration by students to protest the Chancellor's expulsion decision, the author was arrested and accused of inciting students to protest against the Government. He states that he was stripped naked, beaten and subjected to inhuman treatment by the police. After five days of custody he was released thanks to a bribe. He subsequently fled the country.

2.3 As evidence of his allegations, the refers to a letter from his father dated 10 October 1995, in which his father informed him that the police had come to the family's house to look for him. Moreover, he produces an attestation by a psychologist indicating that he suffers from severe and chronic post-traumatic stress disorder. He also states that there exists a brutal dictatorship in Ghana, where no political opposition is tolerated.

2.4 The author requested asylum in Canada in April 1994. The Immigration and Refugee Board heard his claim for refugee status on 15 December 1994. On 25 January 1995, the claim was rejected. The author applied for review before the Federal Court of Canada of the decision of the Immigration and Refugee Board, which he alleged to be manifestly unreasonable and not based on the evidence before it. On 6 September 1995, the Federal Court of Canada denied the application for judicial review. The author emphasizes that such a judicial review is a very limited review to gross errors of law rather than an appeal on the merits. Moreover, he contends that this remedy has no suspensive effect so that an applicant can be deported while his request is pending before the Court.

2.5 In December 1996, the author applied for administrative review by a "post claim determination officer" under the "post-determination refugee class in Canada" programme. This programme is an administrative review without oral hearing which, in the vast majority of cases simply reiterates the reasons given by the Immigration and Refugee Board for refusing the claimant. On 10 January 1997, his application under the programme was rejected.

2.6 On 16 January 1997, the author applied for judicial review of the decision by the post-claim determination officer. On 8 July 1997, the Federal Court of Canada rejected his request for judicial review. The author was then taken into custody with a view to his being deported.

2.7 On 27 October 1997, the State party removed the author to Ghana. According to counsel, as of 5 November 1999, the author was residing without legal status in the Netherlands and wishes to continue with his communication against Canada.

The complaint

3.1 The author states that he would be at risk of torture upon his return to Ghana and that deportation by the Canadian authorities constitutes a violation of the Convention.

3.2 In Canada, the risk assessment is made by immigration officers who, according to the author, do not have the necessary competence in matters of international human rights law or in other legal matters and do not fulfil the basic criteria of impartiality and independence for taking such decisions. The author also refers to a case of the European Court of Human Rights (*Chahal v. The United Kingdom*) which indicates the legal guarantees that must be respected by the country that is deporting:

> "In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialized and the importance the Court attaches to article 3, the notion of an effective remedy under article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3. This scrutiny must be carried out without regard to what the person may gave done to warrant expulsion or to any perceived threat to the national security of the expelling State. ... Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant to determining whether the remedy before it is effective."

The author affirms that the State party's procedure of risk assessment violate this mandatory "independent scrutiny". The same authorities that study the relevance of the removal from Canadian territory proceed to the deportation itself.

State party's observations on admissibility

4.1 In a submission dated 9 November 1998, the State party submitted that the communication was inadmissible for failure to exhaust domestic remedies as required by article 22, paragraph 5 (b), of the Convention and rule 91 of the Committee's rules of procedure.

4.2 The State party underlines that it is a fundamental principle of international law that domestic remedies must be exhaust before remedy from an international body may be sought. This principle gives the State an opportunity to correct internally any wrong that may have been committed before the State's international responsibility is engaged.

4.3 The State party argues that the author has failed to seek ministerial exemption on humanitarian and compassionate grounds under subsection 114 (2) of the Canadian Immigration Act and section 2.1 of its Immigration Regulations. This remedy would have enabled the author to apply to the Minister on Immigration and Citizenship at any time for an exemption from the requirements of the immigration legislation or for admission to Canada on compassionate or humanitarian grounds. In this regard, the State party refers to the jurisprudence of the Committee in its decision *K. v. Canada* (communication No. 42/1996, 25 November 1997), where the author had been deemed not to have exhausted domestic remedies since he had not lodged a request for a ministerial waiver for humanitarian and compassionate grounds.

4.4 The State party also refers to the author's claim that the judicial review by the Federal Court of Canada has no suspensive effect and therefore entitles the State party to deport the applicant while the Federal Court is deciding whether such removal is legal. It emphasizes that in these cases there is a possibility to make an application to the Federal Court for an interim order staying removal while the

decision is pending before the Court. The criteria that are applied by the Federal Court in granting such interim orders are: (a) the seriousness of the issue raised by the author; (b) the irreparable harm suffered by the author in case of removal; and (c) when the balance of convenience favours the order.

Counsel's comments

5.1 The author maintains that he has exhausted all available domestic remedies before submitting his communication. He alleges that it is illusory to believe that the ministerial review for humanitarian reasons, based solely on the risk of return, would be treated differently that the post-determination review.

5.2 It is submitted that requests for a ministerial waiver on humanitarian and compassionate grounds and post-determination review are handled by the same persons or persons at the same level in the same department. As a result, without new evidence, it is obvious that the decision will be the same.

5.3 At the Federal Court level, the same argument applies: leave having been denied for judicial review of the post-determination refusal, it could not be granted on exactly the same facts and the same points of law at a later stage.

5.4 The author underlines the illusory nature of the humanitarian and compassionate review when the Federal Court has already dealt with the issues of substance. As a consequence, and given the constant jurisprudence of the Federal Court of Canada, there is no recourse left with any real chance of success and the case clearly falls within the exception of article 22, paragraph 5 (b), of the Convention.

Issues and proceedings before the Committee

6.1 The Committee wishes to emphasize that although it had requested the State party, under rule 108 (9) of its rules of procedure, not to remove the author while his communication was pending before it, the State party was informed too late to comply with the request. The removal took place almost a month before the transmission of the communication.

6.2 Before considering any claims contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. It also notes that the communication is not an abuse of the right of submission of such communications or incompatible with the provisions of the Convention.

6.3 As regards the exhaustion of domestic remedies, the Committee has taken note of the observations by the State party and by the author's counsel. Pursuant to article 22, paragraph 5 (b), of the Convention, the Committee is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted; this rule does not however apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief to the presumed victim.

6.4 In the present case, the State party argues that the author did not apply for a stay of his removal before the Federal Court and failed to apply for a ministerial exemption on humanitarian and compassionate grounds.

6.5 The author does not dispute that he did not apply for a stay of his removal and did not apply for a ministerial waiver on humanitarian and compassionate grounds. In this regard, the Committee first notes that an application for a ministerial waiver on humanitarian and compassionate grounds is a statutory remedy. Moreover, it notes that in case of refusal of the waiver by the minister, a judicial review is open to the author with the possibility of applying for a stay of removal. Finally, even if the author claims that those remedies were illusory, he has furnished no evidence that they would be unlikely to succeed. The Committee therefore considers that the conditions laid down in article 22, paragraph 5 (b), of the Convention have not been met.

7. The Committee consequently decides:

(a) That the communication is inadmissible;

(b) That this decision may be reviewed under rule 109 of the Committee's rules of procedure upon receipt of a request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply;

(c) That this decision shall be communicated to the State party, the author and his representative.

[Done in English, French, Russian and Spanish, the English text being the original version.]

4. Communication No. 121/1998

Submitted by:	S.H. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Norway
Date of communication:	23 October 1998

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 19 November 1999

Adopts the following:

Decision on admissibility

1.1 The author of the communication is S.H., an Ethiopian citizen born in 1965 currently residing in Norway, where he has applied for asylum. His application, however, has been rejected and he is at risk

of expulsion. He alleges that his forced return to Ethiopia would constitute a violation by Norway of article 3 of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 19 November 1998. At the same time the State party was requested, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, not to expel S.H. to Ethiopia while his communication was under consideration by the Committee. In a submission of 19 January 1999 the State party informed the Committee that S.H. would not be deported to his country of origin until further notice.

The facts as submitted by the author

2.1 The author belongs to the Amhara ethnic group. In 1991 his father, a doctor, disappeared after having been arrested and has not been seen again. The author believes that his father's arrest and disappearance were due to his ethnic background and accusations that he was a supporter of the Mengistu regime. In 1993 the author joined the All-Amhara People's Organization (AAPO).[a] By then he was working as an agriculture adviser in Debre Birhan, an Amhara district. Within the AAPO he was entrusted with two kinds of activities: on the one hand, propaganda and recruitment and, on the other hand, smuggling weapons, organizing attacks to capture weapons and making arrangements for their distribution.

2.2 In 1995 the author was arrested by the security forces during a clandestine meeting he had organized near Debre Birhan. Two days later he was taken to a secret detention centre where he was heavily tortured. After nine months in detention his family bribed a guard who helped him to escape. He stayed in hiding for some time in Addis Ababa, until he travelled to Norway in November 1995.

2.3 Upon applying for asylum he was interviewed at the Asker and Baerum Police Department on 3 and 22 November 1995. The Directorate of Immigration rejected his application on 15 December 1995. The author was not found to be credible for the following reasons: (a) he did not know anything about the arrest of other members of his party; (b) two photographs of the author at liberty bore dates which were during the time when he claimed to have been in detention; (c) the author did not bear visible marks of torture.

2.4 The author filed an appeal with the Ministry of Justice on 5 January 1996 in which he responded to the reasons given by the Directorate in the following manner: he knew about the arrest of several members of his party but he did not know their names; the automatic dating system of the camera used to take the above-mentioned photographs was not working properly because of a flat battery; he had scars as a result of torture but the Norwegian police showed no interest in looking at them.

2.5 On 6 November 1997 the Ministry of Justice rejected the appeal. The Ministry did not find the explanations given by the author convincing. Moreover, the Ministry was informed through the Norwegian Embassy in Nairobi that the author was not known to the AAPO leadership; that, according to that leadership, the meeting at which the author claimed to have been arrested never took place; and that two documents provided by the author with his application for asylum were found to be false.

2.6 The author claims that he was not given the opportunity to comment on the report of the Norwegian Embassy, a report which was based on an inquiry made by a lawyer in Addis Ababa whose

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[a] According to reports by Amnesty International, the AAPO was formed in 1992 as a registered political party which opposed the Government through solely peaceful means.

identity was never revealed to him. The lawyer had gone to Debre Berhan and found no AAPO offices there. He therefore concluded that no AAPO meeting had taken place on 27 January 1995 and that it could not be verified whether the applicant had been arrested. The lawyer also found that even when the AAPO was operating in Debre Berhan the chairman and vice-chairman were not the people indicated by the author in his application.

2.7 On 21 December 1997 the author filed a request for the reconsideration of the case in which he commented on the verification report and the Ministry's interpretation of it. He alleged that his arrest and detention had been conducted in an irregular manner, therefore he could not be expected to produce documentary evidence concerning them. He added that he had never referred to an AAPO office in Debre Berhan, but to the fact that he himself had had links with the office in Addis Ababa. The names of other AAPO members referred to in the verification report had been wrongly spelled and in any case were so common that other elements of identification should have been used. Their positions in AAPO had been misunderstood. He noted that the head of AAPO, Askat Weldeyes, was imprisoned for his underground activities. He further stated that the Norwegian authorities had shown no interest in seeing his scars and that, under article 17 of the Administration Act, it was their responsibility to seek medical advice.

2.8 The author provided the Ministry of Justice with a copy of a medical report of 4 February 1998 by an expert on torture victims. The report referred to the methods of torture described by the author, who claimed that every day for about two weeks he had been beaten with sticks, especially on the knees, head and soles of the feet, and needles were inserted in his feet while he was lying on his back with his hands tied. The report listed a number of physical and psychological problems that could be linked to such treatment, such as pain in the right knee and left foot, walking difficulties, headaches, pains when urinating, depression and sleep disorders. The doctor concluded that the author had been subjected to torture and referred him to a rheumatologist and the psycho-social team for further examination.

2.9 The Psycho-Social Team for Refugees in Northern Norway issued a report on 20 April 1998 indicating that based upon the interviews conducted it was clear that the author had been subjected to torture and had been traumatized by his experiences in prison. He showed all the signs of post-traumatic stress disorder and needed lengthy psychotherapeutic treatment. The report was sent to the Ministry of Justice on 21 April 1998.

2.10 On 10 September 1998 the Ministry rejected the request to reconsider the case. The Ministry refused to accept that the author's current health problems were the result of his experiences in Ethiopia. Since his allegations concerning his political activities were not credible, his injuries could not be the result of such activities. On 14 September 1998 the author's counsel sent a fax to the Ministry requesting that the decision to expel the author be postponed on the basis of article 42 of the Administration Act, according to which if a complainant intends to go to court or has taken his case to court, the Administration can defer execution of a decision until a final judgement is made. On 16 September 1998 the Ministry responded that the execution of the decision of 6 November 1997 would not be deferred in view of the fact that no new facts had been presented.

2.11 The author argues that the Norwegian authorities repeatedly failed to investigate his torture allegations, despite the obligation under article 17 of the Administrative Act to examine all aspects of the case. Such failure is also contrary to articles 15 to 17 of the Aliens Act. He notes that the Ministry rejected the request to reconsider the case without referring to the medical reports and avoiding all comments thereon.

2.12 The author further claims that his story is consistent and disagrees with most of the arguments presented by the Ministry in rejecting his application. For example, in its decision of 10 September 1998 the Ministry stated that the International Committee of the Red Cross (ICRC) had access to most regular

places of detention in Ethiopia and had reported on the occurrence of torture and other forms of physical mistreatment of political detainees. The reports, however, did not refer to torture of AAPO members held in secret detention centres. That such detention centres exist is reflected in reports of NGOs, in particular Amnesty International.

2.13 The Ministry also states that the available information does not indicate the use of torture except against persons connected to rebel groups and that detention of persons connected to the more peaceful opposition groups like AAPO is infrequent and does not involve a risk of torture. The author disagrees and provides a copy of a 1995 Amnesty International report according to which hundreds of AAPO supporters were arrested in 1994 and early 1995. He also provides a copy of an article published in the *Ethiopian Register* magazine in which co-defendants in the trial against the AAPO president accused of participating in an armed uprising described the torture to which they had been subjected after their arrest in 1994, including in the Debre Berhan region. According to the author, their stories are consistent with his own allegations.

2.14 The Ministry states that AAPO has denied having an underground organization. The author replies that very seldom does such an organization publicize its secret work.

2.15 Finally, the author complains about the police interrogation report, which did not fully reflect the information he had provided, in particular with respect to the kind of torture to which he had been subjected.

The complaint

3 The author claims that in view of the fact that he was tortured, as a result of which he is undergoing medical treatment, and that there is a pattern of grave violations of human rights in Ethiopia, it is very likely that he will be tortured again if he is returned to that country.

State party's observations on the admissibility of the communication

4.1 In a submission dated 19 January 1999 the State party objects to the admissibility of the communication as domestic remedies had not been exhausted and asks the Committee to withdraw its request under rule 108 (9) of its rules of procedure. It contends that, when making decisions under the 1988 Immigration Act, the immigration authorities take into consideration Norway's international obligations,[b] including those enshrined in the Convention. Furthermore, article 15 of the Act stipulates that a foreigner must not be sent to an area where he may fear persecution of such kind that would justify recognition as a refugee, or where he/she will be at risk of being sent on to such an area. Corresponding protection shall apply to any foreign national who, for reasons similar to those given in the definition of a refugee, is in considerable danger of losing his life or of being made to suffer inhuman treatment. According to the State party, article 15 of the Immigration Act corresponds to article 3 of the Convention. Although the Act does not refer explicitly to the Convention the latter is applied by the immigration authorities and will be applied by the courts if invoked.

4.2 Asylum-seekers who find their applications for asylum turned down by the administration have the possibility of presenting an application before the courts for judicial review. In accordance with chapter 15 of the 1992 Enforcement of Judgements Act, a concerned party may apply to the courts for an injunction,

[b] Article 4 of the Immigration Act stipulates that "the Act shall be applied in accordance with international rules by which Norway is bound when these are intended to strengthen the position of a foreign national".

either when a case has already been brought or in cases not yet before the courts, asking the court to order the administration to defer the deportation of the asylum-seeker. An injunction may be granted if the plaintiff can demonstrate that the challenged decision will probably be annulled when the main case is adjudicated. In the case under consideration, the fax dated 16 September 1998 by which the Ministry informed the author that stay would not be granted cannot be interpreted as if the Ministry would carry out the deportation even if the author had brought his case before the court. Moreover, the author did not indicate that he intended to bring the case to court.

4.3 Since 1987 more than 150 cases concerning the legality of decisions denying asylum have been brought before Norwegian courts. A majority of those cases have involved a request for the injunction. Courts have their own power to order a stay. If an applicant demonstrates that the requirements for an injunction are fulfilled, the Ministry cannot go ahead with the deportation and is bound to obey the court. Experience shows that the Ministry itself, in the majority of asylum cases brought before the courts, decides administratively to stay its decision until the court of first instance, following an oral hearing, decides on the request for an injunction.

4.4 The State party also refers to the author's claim that his financial situation does not permit him to go to court. Even if that is the case, the argument cannot serve to make the requirement of article 22, paragraph 5 (b) of the Convention inoperative. The wording of the provision is clear and does not allow for this defence. Furthermore, the State party notes that the author is indeed represented by counsel before the Committee.

4.5 In cases like the one under consideration, national courts are better placed than international bodies to assess evidence. This is especially so when it comes to the hearing of parties and witnesses on questions of reliability and truthfulness. In court oral testimony will be subject to examination by both parties and possibly the court itself. Such a procedure is not undertaken by the Committee. The facts of the case as they emerge from the documents are complex and detailed. The details have to be understood in the light of oral testimony presented in court. The requirement of exhaustion of local remedies is therefore even more compelling.

Counsel's comments

5. Counsel claims that the Ministry of Justice tends not to allow asylum-seekers to stay in the country while they prepare a judicial complaint or while the court examines their case. He refers to the statement by the State party according to which more than 150 cases concerning the legality of decisions denying asylum have been brought before Norwegian courts and argues that 150 cases in 12 years is a rather low figure, which demonstrates how difficult it is to have access to the courts. Finally, he claims that the author was unable to raise funds in order to bring his case before the courts.

Additional information submitted by the State party

6.1 By an additional submission dated 29 October 1999, the State party informs the Committee that according to the Immigration Act, an asylum-seeker has the right to free legal advice in relation to the administrative proceedings. This right is limited to five hours of a lawyer's time in relation to the application in the first administrative instance and an additional three hours on administrative appeal. These limits are based on an evaluation of what is needed to ensure proper assistance. It is possible to apply for an extension of such assistance.

6.2 As to the proceedings before the courts, an application for free legal aid may be made to the County Governor in accordance with the Legal Aid Act No. 35 of 13 June 1998. The condition for

receiving such aid is that the applicant's income does not exceed a certain limit, which is normally not the case for asylum-seekers even if they are receiving employment income in addition to the benefits granted by the State. If legal aid is granted, the aid covers counsel's fees in whole or in part. In addition, the aid covers court fees and other costs related to the proceedings, such as the cost of an interpreter. The State party also states that those granted free legal aid in court proceedings must themselves pay a part of the total costs, consisting of a moderate fixed fee amounting to approximately US$45, and an additional share of 25 per cent of the total financial cost beyond the basic fee. However, this amount shall not be paid if the person concerned has an income below a certain threshold.

6.3 The State party states that it is not aware of whether the author has applied for free legal aid in connection with contemplated court proceedings, but notes that the fact that free legal aid is not unconditional when an applicant appeals an administrative decision before the courts cannot exempt the author from the requirement to exhaust domestic remedies.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Committee must decide whether or not the communication is admissible under article 22 of the Convention.

7.2 The Committee notes that the State party challenges the admissibility of the communication on the grounds that all available and effective remedies have not been exhausted. It further notes that the legality of an administrative act may be challenged in Norwegian courts, and asylum-seekers who find their applications for political asylum turned down by the Directorate of Immigration and on appeal by the Ministry of Justice have the possibility of requesting judicial review before Norwegian courts.

7.3 The Committee notes that, according to information available to it, the author has not initiated any proceedings to seek judicial review of the decision rejecting his application for asylum. Noting also the author's claim about the financial implications of seeking such review, the Committee recalls that legal aid for court proceedings can be sought, but that there is no information indicating that this has been done in the case under consideration.

7.4 However, in the light of other similar cases brought to its attention and in view of the limited hours of free legal assistance available for asylum-seekers for administrative proceedings, the Committee recommends the State party undertake measures to ensure that asylum-seekers are duly informed about all domestic remedies available to them, in particular the possibility of judicial review before the courts and of being granted legal aid for such recourse.

7.5 The Committee notes the author's claim about the likely outcome were the case to be brought before a court. It considers, nevertheless, that the author has not presented enough substantive information to support the contention that such remedy would be unreasonably prolonged or unlikely to bring effective relief. In the circumstances, the Committee finds that the requirements under article 22, paragraph 5 (b), of the Convention have not been met.

8. The Committee therefore decides:

(a) That the communication as it stands is inadmissible;

(b) That this decision may be reviewed under rule 109 of the Committee's rules of procedure upon receipt of a request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply;

(c) That this decision shall be communicated to the State party and the author.

[Done in English, French, Russian and Spanish, the English text being the original version.]

5. Communication No. 127/1999

Submitted by:	Z.T. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Norway
Date of communication:	25 January 1998

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 19 November 1999,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. Z.T., an Ethiopian national at present residing in Norway, where his request for asylum has been denied and he risks deportation. He claims that he would risk imprisonment and torture upon return to Ethiopia and that his forced return to that country would therefore constitute a violation by Norway of article 3 of the Convention. The author is represented by the Rådgivningsgruppa (The Advisory Group), a non-governmental refugee and human rights organization.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 5 February 1999. Pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, the State party was requested not to expel the author to Ethiopia pending the consideration of his case by the Committee.

The facts as presented by the author

2.1 The author states that he is of Amharic ethnic origin and was born in Jinka, where his father was a judge. During his time at high school in Addis Ababa, the author participated in several demonstrations against Haile Selaissie and in favour of Colonel Mengistu. When Mengistu came to power in February

1977, young people, including the author, were sent to rural areas as part of a literacy campaign. Disappointed with the regime, the author came into contact with the Ethiopian People's Revolutionary Party (EPRP) and started to work for it.

2.2 According to the author, the EPRP started to organize resistance against the Mengistu regime by calling students and youth back from the rural areas to Addis Ababa. In 1977 the conflicts between the various political groups resulted in the so-called "Red Terror", the brutal eradication of all opposition to the governing Provincial Military Administrative Council (PMAC) and random killings. An estimated 100,000 people were killed. The author, who had been distributing pamphlets and putting up posters in Addis Ababa on behalf of the EPRP, was arrested and taken to a concentration camp, together with thousands of other young people, where he was held for one year between 1980 and 1981. While in the camp he was subjected to fake executions and brainwashing, the so-called "baptism by Mengistu". According to the author, the "Red Terror" ended when the regime was convinced that the leaders of the EPRP were all dead. Many political prisoners, including the author, were then set free.

2.3 After his release he went underground and continued his work for the EPRP. The author states that the Mengistu regime carefully followed the movements of previous political prisoners to suppress a revival of the opposition. In 1986/87, the author was arrested in a mass arrest and taken to "Kerchele" prison, where he was imprisoned for four years. According to the author, the prisoners were forced to walk around naked and were subjected to ill-treatment in the form of regular beatings with clubs. While imprisoned, he suffered from tuberculosis.

2.4 In May 1991, the Mengistu regime fell and the Ethiopian People's Revolutionary Democratic Front (EPRDF) came to power. According to the author, the prison guards fled in panic and the prisoners left. Once free, the author tried to get in touch with members of the EPRP, but all his contacts were gone. He then started to work for the Southern Ethiopian Peoples Democratic Coalition (SEPDC), a new coalition of 14 regional and national political opposition parties. The author worked as a messenger for one of the leaders, Alemu Abera, in Awasa. In February 1995 he was on his way to deliver a message to Mr. Alemu when he was caught by the police.

2.5 The author states that he was kept in detention for 24 hours in Awasa and then transferred to the central prison, "Meakelawi Eser Bete", in Addis Ababa. After three days, he was taken to "Kerchele" prison where he was kept for one year and seven months. He was never tried or had contact with a lawyer. The treatment in prison was similar to what the author had experienced during his first imprisonment. He says that he was taken to the torture room and threatened that he would be shot if he did not cooperate. He believes that the only reason he was not severely tortured like many other prisoners was that he was already in a weak physical condition. While in prison he developed epilepsy.

2.6 The author, who had previously worked as a technician, was made responsible for certain repairs in prison. On 5 October 1996 he managed to escape when he was taken to the house of one of the high-ranking guards to make some repairs. Through a friend, the author managed to get the necessary papers to leave the country and requested asylum in Norway on 8 October 1996.

2.7 On 18 June 1997 the Directorate of Immigration turned down his application for asylum, mainly on the basis of a verification report by the Norwegian Embassy in Nairobi, on the basis of contradictory information said to have been given by the author and his mother and chronological discrepancies in his story. He appealed on 3 July 1997. The appeal was rejected by the Ministry of Justice on 29 December 1997 on the same grounds. On 5 January 1998, a request for reconsideration was made which received a negative decision from the Ministry of Justice on 25 August 1998.

2.8 According to the author, his right to free legal assistance had been exhausted and the Advisory Group agreed to take his case on a voluntary basis. On 1 and 9 September 1998, the Advisory Group made additional requests for reconsideration and deferred execution of the expulsion decision, which were rejected on 16 September 1999. The author has submitted to the Committee, in this regard, copies of 16 pieces of correspondence between the Advisory Group and the Ministry of Justice, including a medical certificate from a psychiatric nurse indicating that the author suffers from post-traumatic stress syndrome. The date of expulsion was finally set for 21 January 1999.

2.9 The author states that all the inconsistencies regarding dates referred to by the Norwegian authorities can be explained by the fact that during the initial interrogation he agreed to be questioned in English, not having been informed that he had the right to have an Amharic interpreter present. He states that since the difference in years between the Ethiopian and Norwegian calendar is approximately eight years, when he tried to calculate the time in Norwegian terms and translate this into English, several dates became confused. The situation was further complicated by the fact that in Ethiopia the day starts at the equivalent of 6 o'clock in the morning in Norway. That meant that when the author said "2 o'clock", for instance, it should be interpreted as "8 o'clock".

2.10 The author further states that during the interrogation he referred to the Southern Ethiopian People's Democratic Coalition (SEPDC) as the "Southern People's Political Organization" (SPPO), which does not exist. He claims that the error was due to the fact that he only knew the name of the organization in Amharic. However, he gave the correct name of the leader of the SEPDC, who was one of his contact persons.

2.11 Finally, the author provided a detailed explanation regarding the discrepancies between his statements and the information provided by his mother to the representative of the Norwegian Embassy in Nairobi.

The complaint

3. The author argues that he would be in danger of being imprisoned again and tortured if he were to return to Ethiopia. He says that during the asylum procedure, the immigration authorities did not seriously examine the merits of his asylum claim and did not pay enough attention to his political activities and his history of detention.

State party's observations on admissibility

4.1 By its submission of 31 March 1999, the State party challenges the admissibility of the communication owing to the failure to exhaust domestic remedies, and asks the Committee to withdraw its request under rule 108, paragraph 9, of its rules of procedure.

4.2 The State party submits that applications for political asylum are dealt with in the first administrative instance by the Directorate of Immigration, while a possible administrative appeal is decided by the Ministry of Justice. As soon as a person submits an application for asylum, an attorney is appointed. Thus, at the time he gives his first statement to the immigration authorities, the applicant has free legal representation.

4.3 Following the usual practice the author was informed that: (a) he was obliged to give the authorities all relevant information as thoroughly as possible; (b) additional information could be supplied later, but that could weaken the trustworthiness of the application; and (c) the civil servants and interpreters

"dealing with his application were under a duty to observe secrecy. The author's application underwent detailed scrutiny both in the Directorate of Immigration and on appeal by the Ministry of Justice. However, it was turned down by both instances and the author was asked to leave Norway.

4.4 The State party submits that as a general rule, in the absence of any contrary provision, the legality of an administrative act may be challenged in Norwegian courts. Thus, asylum-seekers who find their applications for political asylum turned down by the administration have the possibility of filing an application before Norwegian courts for judicial review and thereby having the legality of the rejection examined. Such an application is not subject to leave by the courts; neither is an application for an injunction.

4.5 A party concerned may apply to the courts for an injunction, asking the court to order the administration to defer the deportation of the asylum-seeker. According to the Enforcement of Judgements Act 1992, an order for an injunction may be given if the plaintiff (a) demonstrates that the challenged decision probably will be annulled by the court when the main case is adjudicated; and (b) shows sufficient reasons for requesting an injunction, i.e. that an injunction is necessary to avoid serious damage or harm if the expulsion were enforced without the court having had the opportunity to adjudicate the main case. Where the contested decision is a denial of asylum status the second requirement in practice merges with the first requirement, which means that in an asylum case an application for an injunction depends on whether or not the plaintiff can demonstrate that the challenged decision probably will be annulled by the court in the subsequent main case.

4.6 The author says in part 1 of his communication that a case concerning the legality of the decision denying him asylum in Norway may only "theoretically" be taken to Norwegian courts. This seems to indicate that he regards the domestic remedies as not in practice having been accessible to him. The Government contends that practice in Norway clearly shows otherwise: since 1987 more than 150 cases concerning the legality of decisions denying asylum have been brought before Norwegian courts. A majority of these cases included a request for an injunction.

4.7 The State party notes that the author's last argument in connection with the admissibility question concerns his financial situation. It is argued that he will not be able to afford to go to court. In that regard, the Government would point out that even if that were the case, it cannot serve to remove the requirement of article 22, paragraph 5 (b), of the Convention. The wording of the provision is clear and is not open for this defence. Secondly, the author is in fact represented before the Committee.

4.8 The Government further states that the national courts fill a crucial function in the protection of human rights. International supervision in its various forms is secondary. The international bodies are in cases like the present one less well placed than national courts to assess evidence. This is especially so when it concerns the hearing of parties and witnesses on questions of reliability and truthfulness. In court oral testimony will be subject to examination by both parties, and possibly by the court itself. Such a procedure is not undertaken by the Committee. The facts of the case as they emerge from the documents are complex and detailed. The details have to be understood in the light of oral testimony presented in court. The requirement that domestic remedies be exhausted is therefore even more compelling. The Committee ought not to shortcut the case by considering the merits of the communication.

4.9 In conclusion, the State party submits that the author has not brought his case before Norwegian courts, either as an application for annulment or in the form of an application for an injunction. His case would have been tried by Norwegian courts had he brought the case, since the courts have the authority to try both questions of fact and questions of law (i.e. the application of the Convention).

Counsel's comments

5.1 With reference to the State party's comments about the author's financial situation and the fact that he is being represented before the Committee, counsel points out that she has no legal background and that she represents the author on a voluntary basis.

5.2 Counsel further states that according to information available to her, the provisions mentioned by the State party regarding legal aid and assistance to all asylum-seekers are limited to five hours for the administrative application and three hours in the case of a request for reconsideration. In the case of a final negative administrative decision, the appointed lawyer withdraws from the case and the asylum-seeker no longer has any right to free legal representation. In the case under consideration, the lawyer finalized her work in August 1998, once the Minister of Justice adopted his decision. Hiring a lawyer would cost more than the author, living in a centre for asylum-seekers and with no right to a work permit, receives from the State to cover his living expenses for one to two years. In some cases, non-governmental organizations manage to raise money for the purpose of hiring lawyers for asylum-seekers, but this was not possible in the author's case.

5.3 It is further pointed out that although the State party states that asylum-seekers have successfully brought their cases before Norwegian courts, the statistics show that the majority of the cases receive negative decisions. Counsel draws the attention of the Committee to, *inter alia*, a case where an asylum-seeker from Kenya was expelled in March 1998, before his case had been examined by the courts and while his request for an injunction was pending. On his return to Kenya, the asylum-seeker was allegedly ill-treated. The case was not brought before the court until February 1999. Although unable to attend his own court case, the plaintiff was nevertheless obliged to pay the legal expenses.

5.4 In the light of the State party's argument that oral testimony presented in court is essential to assess a case fully, counsel points out that the author has on several occasions expressed his willingness to give an oral account before the Ministry of Justice, but he was never granted audience. With reference to all the above, counsel concludes that all available domestic remedies have been exhausted and that the communication should therefore be declared admissible.

Additional information submitted by the State party

6.1 By an additional submission dated 29 October 1999, the State party informs the Committee that according to the Immigration Act, an asylum-seeker has a right to free legal advice in relation to the administrative proceedings. This right is limited to five hours of a lawyer's time in relation to the application in the first administrative instance and an additional three hours on administrative appeal. These limits are based on an evaluation of what is needed to ensure proper assistance. It is possible to apply for an extension of such assistance.

6.2 As to the proceedings before the courts, an application for free legal aid may be made to the County Governor in accordance with the Legal Aid Act No. 35 of 13 June 1998. In order to be eligible for legal aid the applicant's income must not exceed a certain limit; this is normally the case for asylum-seekers, even if they are receiving employment income in addition to the benefits granted by the State. If legal aid is granted, the aid covers counsel's fees in whole or in part. In addition, the aid covers court fees and other costs related to the proceedings, such as the cost of an interpreter. The State party also notes that those granted free legal aid in court proceedings must themselves pay a part of the total costs, consisting of a moderate fixed basic fee amounting to approximately US$45, and an additional share of 25 per cent of the total financial cost. However, the State party points out that this amount shall not be paid if the person concerned has an income below a certain threshold.

6.3 The State party states that it does not know whether the author has applied for free legal aid in connection with contemplated court proceedings, but the fact that free legal aid is not granted unconditionally when an applicant brings an administrative appeal before the courts cannot exempt the author from the requirement to exhaust domestic remedies.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Committee must decide whether or not the communication is admissible under article 22 of the Convention.

7.2 The Committee notes that the State party challenges the admissibility of the communication on the grounds that all available and effective domestic remedies have not been exhausted. It further notes that the legality of an administrative act may be challenged in Norwegian courts, and asylum-seekers who find their applications for political asylum turned down by the Directorate of Immigration and on appeal by the Ministry of Justice have the opportunity to request judicial review before Norwegian courts.

7.3 The Committee notes that according to information available to it, the author has not initiated any proceedings to seek judicial review of the decision rejecting his application for asylum. Noting also the author's statement about the financial implications of seeking such review, the Committee recalls that legal aid for court proceedings can be sought, but that there is no information indicating that this has been done in the case under consideration.

7.4 However, in the light of other similar cases brought to its attention and in view of the limited hours of free legal assistance available for asylum-seekers for administrative proceedings, the Committee recommends that the State party undertake measures to ensure that asylum-seekers are duly informed about all domestic remedies available to them, in particular the possibility of judicial review before the courts and the opportunity of being granted legal aid for such recourse.

7.5 The Committee notes the author's claim about the likely outcome were the case to be brought before a court. It considers, nevertheless, that the author has not presented enough substantial information to support the belief that such remedy would be unreasonably prolonged or unlikely to bring effective relief. In the circumstances, the Committee finds that the requirements under article 22, paragraph 5 (b), of the Convention have not been met.

8. The Committee therefore decides:

(a) That the communication as it stands is inadmissible;

(b) That this decision may be reviewed under rule 109 of the Committee's rules of procedure upon receipt of a request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply;

(c) That this decision shall be communicated to the State party and the author.

[Done in English, French, Russian and Spanish, the English being the original version.]

6. Communication No. 140/1999

Submitted by:	A.G. (name withheld)
Alleged victim:	The author
State party:	Sweden
Date of communication:	14 April 1999

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 2 May 2000,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. A.G., born on 21 March 1967, an asylum-seeker of Moldovan origin, currently residing in Sweden. The author claims that he would risk torture if he is returned to the Republic of Moldova and that his forced return to that country therefore would constitute a violation by Sweden of article 3 of the Convention. The author is not represented by counsel.

The facts as presented by the author

2.1 The author states that in December 1991, following the fall of the Soviet Union and the independence of Moldova, he became active in the Union of Moldovans of Transnistria. The author joined the Transnistrian independence army in May 1992 and received training first in Tiraspol and then in Bender, where he took part for several months in fighting against the Moldovan army. The author was allegedly arrested on 20 June 1992 by the Moldovan police, presumably for armed resistence. The author claims that he managed to escape after a few days, when the police station was attacked by the Transnistrian independence army.

2.2 In August 1992 the author and many others deserted from the Bender guards, since in the author's view the unit had become too independent in its attempts to provoke continued fighting with the Moldovan army despite ongoing peace negotiations with the Transnistrian independence army. The author claims that he stayed with a friend in Tiraspol, in order to hide from both the Moldovan and local Transnistrian police, who cooperated in their search for members of the Bender guards.

2.3 The author claims that he was again arrested in November 1992 and eventually brought to the Osjtj 29-11 prison in Balti, in the north of Moldova. The author was unofficially told that he was arrested because of his service in the Bender guards. He was allegedly held for almost three years without trial. The author submits that while in prison he was repeatedly subjected to abusive and degrading ill-treatment. He was allegedly beaten by other prisoners between 40 and 50 times, which resulted in loss of consciousness on several occasions. The prison guards not only ignored his treatment by the other

prisoners, but instigated and contributed to it, and occasionally put him in a solitary confinement cell. The author further submits that the prison guards also mistreated him by beating and kicking him, mainly on the head.

2.4 In August 1993, the author was sentenced to 13 years in prison, presumably for treason, illegal possession of weapons and resisting arrest. Two years later, in August 1995, the author was again brought to court as a witness in another trial and managed to escape from the three prison guards escorting him. The author arrived in Sweden, via Ukraine, Russia and Finland, on 15 December 1995 and applied for asylum the following day.

2.5 On 21 October 1996 the Swedish Board of Immigration rejected the author's request. The author appealed the decision to the Aliens Appeal Board and following an additional oral hearing with the author on 5 February 1999 the appeal was rejected on 18 March 1999.

Complaint

3. With reference to the facts presented, the author fears that he will be subjected to renewed torture if he is returned to Moldova and that his forced return would therefore constitute a breach by Sweden of article 3 of the Convention.

State party's observations on admissibility

4.1 On 22 June 1999 the Committee transmitted the communication to the State party for comment. In its submission of 16 August 1999, the State party contested the admissibility of the author's communication with reference to article 22, paragraph 5 (a), of the Convention.

4.2 The State party informed the Committee that on 21 March 1999 the author had submitted a complaint relating to his expulsion to the European Court of Human Rights, which was registered as a case pending before the Court on 3 May 1999. The State party submits that the Committee should declare the communications inadmissible in accordance with the above mentioned article, which states that the Committee shall not consider any communication if the same matter is being, or has been examined under another procedure of international investigation or settlement.

Author's comments on admissibility

5. On 6 September 1999, the Committee transmitted the State party's observations regarding the question of admissibility to the author for his comments. The author has not submitted any additional information disputing or confirming the observations of the State party.

Issues and proceedings before the Committee

6.1 Before considering any claim in a communication, the Committee against Torture must decide whether or not a communication is admissible under article 22 of the Convention.

6.2 In the light of the State party's observations and the absence of response on the part of the author thereto, the Committee has verified and assured itself that a complaint from the author was in fact registered by the European Court on 3 May 1999. The Committee notes that the author's communication

before it was registered on 22 June 1999, while already pending examination under another procedure of international investigation or settlement.

7. Accordingly, the Committee decides:

(a) That the communication is inadmissible in accordance with article 22, paragraph 5 (a) of the Convention;

(b) That this decision may be reviewed under rule 109 of the Committee's rules of procedure upon receipt of a request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply;

(c) That this decision shall be communicated to the State party and the author.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Annex IX

List of documents for general distribution issued during the reporting period

A. Twenty-third session

Symbol	*Title*
CAT/C/17/Add.21	Second periodic report of Austria
CAT/C/29/Add.6	Second periodic report of Malta
CAT/C/32/Add.3	Initial report of Uzbekistan
CAT/C/39/Add.3	Initial report of Azerbaijan
CAT/C/39/Add.1	Third periodic report of Peru
CAT/C/42/Add.1	Initial report of Kyrgyzstan
CAT/C/44/Add.6	Third periodic report of Finland
CAT/C/51	Provisional agenda and annotations
CAT/C/SR.391-409	Summary records of the twenty-third session of the Committee

B. Twenty-fourth session

Symbol	*Title*
CAT/C/24/Add.5	Initial report of Slovenia
CAT/C/28/Add.4	Initial report of the United States of America
CAT/C/37/Add.4	Initial report of El Salvador
CAT/C/39/Add.2	Third periodic report of China
CAT/C/43/Add.3	Second periodic report of Armenia
CAT/C/44/Add.4	Third periodic report of the Netherlands (Antilles and Aruba)
CAT/C/44/Add.5	Third periodic report of Poland
CAT/C/44/Add.7	Third periodic report of Portugal
CAT/C/44/Add.8	Third periodic report of the Netherlands (European part)
CAT/C/49/Add.1	Third periodic report of Paraguay
CAT/C/52	Note by the Secretary-General listing initial reports due in 2000
CAT/C/53	Note by the Secretary-General listing second periodic reports due in 2000
CAT/C/54	Note by the Secretary-General listing third periodic reports due in 2000
CAT/C/55	Note by the Secretary-General listing fourth periodic reports due in 2000
CAT/C/56	Provisional agenda and annotations
CAT/C/SR.410-438/Add.1	Summary records of the twenty-fourth session of the Committee

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